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Director's Decisions for California

Desert Lands

1960-1968

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appeal to Sec
affirmed A-28423 11-14-60 LO (Sac)

DESERT LAND. * 2 Application

A desert land application for entry of lands within an established irrigation district is properly rejected where it is shown that applicant already holds 160 acres of public lands within the same irrigation district.

Franklin P. Rambo, Los Angeles 0143352 (February 12, 1960)

RD

In reply refer to:

Los Angeles 0143352
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 12, 1960

Certified Mail
Return Receipt Requested

DECISION

Franklin P. Rambo	:	Desert Land Application

Decision Affirmed

Franklin P. Rambo has appealed from a decision of the Chief, Lands Adjudication Unit, dated November 3, 1959, which rejected his desert land application for the stated reason that he is not entitled to a desert land entry within an irrigation district since he now holds the 160-acre limit under a homestead entry.

The appellant asserts that the decision is erroneous because it misconstrues the intent of the Smith Act, August 11, 1916 (39 Stat. 506; 43 U.S.C., 1958 ed., 621-630), and that he is entitled to an additional entry of 160 acres under the Desert Land Law even though he holds an entry of 160 acres under the Homestead Laws within the Imperial Irrigation District.

The applicable regulation, 43 CFR 232.5(b), implementing the law, provides that:

> "Entry of lands within an irrigation district which the Secretary of the Interior has approved under the act of August 11, 1916 (39 Stat. 506; 43 U.S.C. 621-630), is limited to 160 acres."

The cited regulation and the act are clear regarding the disposition of public lands within an established irrigation district. Entry is limited to 160 acres regardless of the type of entry. See Charles Schoenburg, et al., A-27434 (June 3, 1957).

Accordingly, the decision appealed from is hereby affirmed.

Mr. Franklin P. Rambo is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations 43 CFR, Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director;

Enclosure

DISTRIBUTION:

Mr. Franklin P. Rambo (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JJS

appeal to Sec
affirmed A-28455 L(Sec)
9-11-61

DOCKET FILES

DESERT LANDS * 1 Generally

CLASSIFICATION * 4 Lands Valuable for Oil and Gas

Consent to the reservation of oil and gas to the United States under the Act of July 17, 1914 (30 U.S.C., 121-123), is required where the Geological Survey reports the land is valuable prospectively for oil and gas prior to the time acceptable final proof is filed, unless the land is reclassified as nonmineral upon the request and showing of the holders of the entry or as the result of any hearing that might be held in connection therewith.

Howard C. Eells et al., Los Angeles 038265 (February 24, 1960)

In reply refer to:

Los Angeles 038265
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 24, 1960

Certified Mail
Return Receipt Requested

DECISION

Howard C. Eells :
Edith Frances Eells : Desert Land Entry

Decision Affirmed

Mr. Howard C. Eells has appealed from a decision dated October 20, 1959, of the Chief, Land Adjudication Unit, requiring that a waiver of oil and gas be submitted in connection with the above-identified desert land entry, as it has been determined that the land embraced therein is prospectively valuable for oil and gas.

The records show that the entry, which was allowed to Roy G. Stuart on February 11, 1909, and thereafter assigned to Francis C. Eells on March 30, 1911, was later assigned to Ethel H. Eells on November 15, 1928, (assignment recognized by the Commissioner of the former General Land Office on August 7, 1930), who held it until her death, at which time it enured to her heirs, the appellant, Howard C. Eells, and Edith Frances Eells, under the provisions of her will and by operation of law.

The records further show that based on a Geological Survey report dated July 2, 1930, the lands embraced in this entry were not at that time considered to be prospectively valuable for oil and gas, and the entry was allowed without the requirement that a waiver of oil and gas be submitted. On June 24, 1959, a subsequent report from the Geological Survey indicates, at that time, the land was considered to be prospectively valuable for oil and gas. Satisfactory final proof has never been submitted in this case, and action on the case has been suspended by a Departmental decision on November 27, 1914, granting an extension under the provisions of section 5 of the act of June 27, 1906 (34 Stat. 520).

The appellant contends in substance that he should not be required to execute a mineral waiver in connection with the desert land entry for the reasons, (1) that a patent should have been issued before the date of the decision here appealed from, (2) that no such requirement was made relative to another desert land entry recently patented in the same area, (3) that there is no prospective oil or gas value in the land, and an application for an oil and gas lease had been rejected recently on lands adjoining on the basis of no prospective value for oil and gas, (4) and further that there has been no separate report of the Geological Survey on the lands in question.

The appellant, however, has not furnished any substantial or positive data, supporting his contentions, to refute the classification of the land by the Geological Survey as being prospectively valuable for oil and gas. Section 3 of the Act of July 17, 1914 (30 U.S.C., 1952 ed., secs. 121-123), which requires that in certain cases patents to public land will contain a reservation of minerals, including oil and gas, provides that:

> "Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall locate, select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same." (Emphasis supplied)

This act applies to desert land entries, as well as other types of nonmineral entries. When land within a desert land entry is reported to be prospectively valuable for oil and gas before the entryman submits final proof, it is proper to require the entryman to file consent to a reservation to the United States of the oil and gas deposits in the lands in the entry or to contest the mineral classification of the land. Allien M. Whitsett, Jr., et al., A-27611 (September 15, 1958).

In effect, it is the appellant's contention that since there is no affirmative data showing that the land has oil and gas potential, or that the land is known to be valuable therefor, there is not a proper basis for the filing of an oil and gas waiver. This position is contrary to the expressed criterion embodied in 43 CFR 102.22(a), which in applicable portion reads as follows:

> "Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected is in an area in which *valuable deposits of oil and gas may occur* because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be allowed 30 days from notice to furnish consent under the act of July 17, 1914 (38 Stat. 509; 30 U.S.C., 121-123) * * *." (Emphasis supplied)

Thus a report of the Geological Survey made before the earning of equitable title that land *may be* valuable for oil and gas is a sufficient basis for calling for a waiver of oil and gas. In the circumstances of this case, it need not be shown that the land was *known* to be valuable for oil and gas as a condition precedent to requiring a waiver of oil and gas. Cf. 43 CFR 102.22(a).

Since it has been determined that the land in the entry is valuable prospectively for oil and gas prior to submission of final proof, the appellant and Edith Frances Eells are allowed 30 days from the receipt hereof within which to file in this office a consent to the reservation of oil and gas to the United States, or to request the reclassification of the land as nonmineral, such request to be accompanied by evidence of geologists or others who are qualified, stating why they believe the lands are without value for oil and gas, and in the event reclassification is denied, then to apply for a hearing. If a hearing is ordered the burden of proof will be on Howard C. Eells and Edith Frances Eells, holders of the entry. Failure to take one of the above indicated actions will be cause for cancellation of the entry. 43 CFR 1954 ed., 102.22(a).

For the reasons herein stated, the decision appealed from is hereby affirmed.

Mr. Howard C. Eells and Miss Edith Frances Eells are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Mr. Howard C. Eells, (Certified Mail)
Miss Edith Frances Eells (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JJS

LO(Lac)

DOCKET FILES

DESERT LAND * 2 Application

A desert land application is properly rejected in the absence of plausible presumptive evidence that a permanent and sufficient water supply is available for the irrigation of the lands, and a showing concerning the character of the land. An applicant must also submit plans of his proposed irrigation completed in sufficient detail to reasonably demonstrate that development of the land is feasible by some practical means.

Philip W. M. Richter et al., Los Angeles 0160798 (March 3, 1960)

In reply refer to:
Los Angeles 0160798
0160831
0161784
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 3, 1960

Certified Mail
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DECISION

Philip W.M. Richter :
Mary Frances Richter : Desert Land Applications
Dominic F. Meo :

Decisions of the Chief, Land Adjudication Unit, Affirmed

Philip W.M. Richter, Mary Frances Richter, and Dominic F. Meo have appealed from decisinns of the Chief, Land Adjduciation Unit of July 6 and 28, 1959, which rejected their applications for the stated reasons that they were not accompanied by proper showings as contemplated by the regulations, 43 CFR, 1954 ed., Part 232.

The regulatior 43 CFR 232.14 provides that at the time of filing application with the Manager, the applicant must submit a map of the proposed development and a summary statement of facts demonstrating that an adequate water supply is available for the irrigation of the land 1/ and that the land is of a character suitable for irrigated crop production. See Richard G. Peeples, 48 L.D. 554 (1922). He must also submit a plan of the proposed irrigation development completed in sufficient detail to reasonably demonstrate that the lands are susceptible of irrigation by some practical means. See Martha K. Bongfeldt et al., Los Angeles 0150912, approved September 25, 1959. In the absence of plausible presumptive evidence that the lands are susceptible of reclamation by some practical means, desert land applications must necessarily be rejected. See June C. Keane, A-27847 (February 17, 1959).

The appellants submitted with their applications a summary analysis of the chemical constituents of the soils. The showings indicate that the samples (one for each application involved) were taken from a point at or near the site of the proposed well. They do not indicate the depth or horizon from which the samples were taken. They have also submitted plans for a well and sprinkler irrigation system. However, there is no indication that these plans for the development of the lands if carried to completion

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1/ In the case of Mullen V. Keaster, 44 L.D. 161 (1915), the Department stated in applicable part that the Desert Land Act, contemplates that an entryman thereunder shall show a permanent and feasible source of water supply sufficient to irrigate all of the land entered or as much thereof as is susceptible of irrigation and to keep it permanently irrigated.

would be sufficient to comply with the requirements for final proof under the Desert Land Act, See June C. Keane, supra, or that geological circumstances are such that water would be available in amounts required for the irrigation development of the lands as contemplated by the Desert Land Act. See Richard G. Peeples, supra. 2/

The appellants assert that they should be issued special land use permits to go upon the land to drill and explore for water. However, in the absence of information concerning the production of wells in the area, geological information bearing on the issue of water supplies available for irrigation in the area, or other plausible presumptive evidence that a permanent and sufficient water supply might be recovered for the irrigation of the land, a special land use permit could not be properly allowed. See Peter W. Breene et al., Los Angeles 0148894 etc, approved September 25, 1959. Moreover, there have been no proper plans submitted to demonstrate that irrigation of the lands is feasible in the event water could be developed. In the circumstances, we see no justification for issuing special land use permits to explore for ground water.

The fact that State law governs generally the existence or the acquisition of a right to use water for irrigating a desert land entry, does not foreclose a departmental determination under applicable Federal law of the sufficiency of the water supply to justify acceptance of additional desert land entries. Availability of water in any area of limited supply is of controlling importance in determining under Federal law the suitability of public lands for entries of this type. 3/ All existing entitlements are to be considered. Indeed, section 4 of the Desert Land Act of March 3, 1877 4/ as added, required a showing in the plans submitted by desert land entrymen of sufficient water to irrigate thoroughly and reclaim the lands. This is implemented by detailed regulations issued 5/ under the general regulatory authority of the Secretary of the Interior. 6/ These administrative implementations and the determinations made under applicable Federal law do not constitute efforts either to establish or prejudge existing rights of landholders to the use of water under applicable provisions of State law. The extent of a correlative right or an appropriative right of a private landholder in California to use water is determined generally by the laws of that State. 7/

2/ In that case the Department stated syllabus that: "Desert entires will not be allowed in areas where there is no presuasive geologic, topographic, or other evidence tending to furnish a reasonable assurance of an existing, sufficient, and economically available water supply, and an exception to this rule will not be made on the ground that the lands are situated in an undeveloped field."

3/ See Ruby E. Huffman et al., 64 I.D. 57, 69-70 (1957).

4/ 19 Stat. 377, 43 U.S.C 327

5/ 43 CFR, 1954 ed., Part 232

6/ R. S. § 2478, 43 U.S.C. 1201

7/ See Ruby E. Huffman et al., supra, p. 60 and the California decisions cited therein.

As to the appellants' request for a hearing, a hearing is not held as a matter of right in classifying public lands. Cf. Leonard R. Noren et al., A-27147 (August 1, 1955). The appellants have had an opportunity to put into the record any information they desire. In Margaret A. Andrews et al., 64 I.D. 9 (1957) the Department stated that a hearing will not be granted where there in no reasonable likelihood that it would develop facts decisive of the issues and no showing has been made by the appellants that they would be able to present evidence controverting the facts of record. Accordingly, the request for a hearing is denied. The decisions of the Chief, Land Adjudication Unit are affirmed.

Philip W.M. Richter, Mary Frances Richter and Dominic F. Meo are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each desert land application included in the appeal. If the appeal covers all entries adversely affected by this decision the total filing fee is $15.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

G. N Dixon

DISTRIBUTION:

Mr. William Blair Dalbey, Attorney at Law (Certified Mail)
Mr. Philip W.M. Richter (Regular Mail)
Mrs. Mary Frances Richter (Regular Mail)
Mr. Dominic F. Meo (Regular Mail)
Lands Staff Officer
Appeals List No. 1
CFG

appeal to Sec
affirmed A-28468
11-22-60

DOCKET FILES

DESERT LAND * 4 Proof

Decisions of the Manager which denied applications for an extension of time and called upon the entrymen to submit final proof subject to penalty of cancellation of the entries will be affirmed and the entries canceled where the final proof testimony submitted shows that the entrymen have not complied with the final proof requirements of the desert land act and proofs submitted indicate that improvements toward the reclamation of the lands consist of nothing more than the first breaking of 145 acres, some fencing and road construction on the entries.

There is no justification for granting an extension of time on the grounds that the entryman has been deterred in his efforts to obtain an irrigation water supply where there has been no showing that the association, company, or individual who is to supply irrigation water owns or controls the necessary facilities to make delivery to the lands or that the entryman owns any stock or other interest in the organization. Even a contract to make delivery of water is insufficient in the absence of a showing of actual, tangible work, in the way of an irrigation system, on the entryman's claim.

Joseph S. Holt et al., Los Angeles 099825, etc. (March 3, 1960)

In reply refer to:

Los Angeles 099825
099826
5.04g

March 3, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Joseph S. Holt : Desert Land Entries
Rose J. Holt :
:

Decisions of the Manager Affirmed;
Entries Canceled

Joseph S. Holt and Rose J. Holt have appealed from a decision of the Chief, Land Adjudication Unit, which denied their requests for extensions of time within which to make final proof and called upon them to submit their final proofs subject to penalty of cancellation of the entries.

The appellants have appealed alleging in substance that they have been prevented from developing the land because Orson Holt with whom they had contracted to develop the land in January, 1956, lost a hand and was unable to carry out the development as agreed upon or to secure the necessary financial assistance and because A. Y. Satterfield who on December 3, 1958, agreed to proceed with the development failed to do so. The appeal states further that Mr. Satterfield was precluded in his efforts to develop the lands because K. O. Burt, well driller, who agreed to drill two wells, represented his machinery falsely and was unable to drill the wells upon the lands in accordance with the agreement. It also states that still a third attempt by a concern referred to as Moffitt and Wells failed in completing the work due to adverse weather conditions and a steel shortage.

The applicable regulation 43 CFR, 1954 ed., 232.37 provides in pertinent part that:

> " * * *The period of 4 years may be extended, in the discretion of the authorized officer, for an additional period not exceeding 3 years, if, by reason of some unavoidable delay in the construction of the irrigation works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation required within the

> 4 years. * * * Applications for extension under said act will not be granted unless it is clearly shown that failure to reclaim and cultivate the land within the regular period of 4 years was due to no fault on the part of the entryman but to some unavoidable delay in the construction of the irrigation works for which he was not responsible and could not have readily forseen. (37 L.D. 332). It must also appear that he has complied with the law as to annual expenditures and proof thereof."

The record reveals that the entries were allowed April 22, 1955. The ordinary 4 year entry period expired April 21, 1959. Annual proofs filed on March 2, 1959, 1/ indicate that the only improvements on the lands to that date consisted of the initial breaking of 145 acres, some fencing, and road construction along the east and west boundaries of each of the two entries. 2/

The appellants appear to rest their case on the failure of others to live up to certain agreements to reclaim the lands. However, there is nothing in the record to show the terms or conditions of the purported agreement between Orson Holt and the entrymen. As to the agreement between A. Y. Satterfield and the entrymen outlined in the appeal, such an agreement even if honored would not lead to compliance with the requirements for final proof under the Desert Land Act. 3/ The Desert Land Act contemplates that an entryman thereunder shall show a permanent and feasible source of water supply and the necessary installations and equipment that would be required to irrigate all of the land entered or as much thereof as is susceptible or irrigation and to keep it permanently irrigated. See Mullen v. Keaster, 44 L.D. 161 (1915).4/ Accordingly, a contract which merely called for the leveling, planting, and watering of 40 acres of the lands embraced by each of the desert land entries involved would not satisfy the final proof requirements of the Desert Land Act.

1/ There is no evidence that the 2nd year proof was filed by Rose J. Holt in connection with her desert land entry, Los Angeles 099826.

2/ The 3rd year annual proofs for the two entries report identical improvements and expenditures.

3/ Concerning the agreement with A. Y. Satterfield the appeal states as follows: "Written agreement was subsequently made between us and A. Y. Satterfield and we quote from this agreement: 'WHEREAS, WE ARE UNABLE TO DRILL NECESSARY WELLS TO SECURE NECESSARY WATER, . . . WHEREAS, IN ORDER TO GET PATENT TO LAND FROM U.S. GOVERNMENT, 40 ACRES OF LAND FOR EACH ONE HALF SECTION MUST BE LEVELED, PLANTED AND WATERED, . . . SATTERFIELD SHALL DRILL A MAXIMUM OF TWO WELLS UPON ONE OF THE DESCRIBED PARCELS OF LAND (which included Orson Holt entry) AND INSTALL THE NECESSARY PUMPING EQUIPMENT, WITH ALL MONEY FOR WELL AND PUMPING EQUIPMENT TO BE ADVANCED BY SATTERFIELD'. . !" Details concerning the location or other information relating to the entry of Orson Holt is not disclosed by the record.

4/ The record indicates that 70 percent or approximately 224 acres embraced by the entry of Joseph S. Holt are irrigable if water is available and that 80 percent or approximately 256 acres of the entry of Rose J. Holt is likewise irrigable.

The appellants apparently now rely for the development of their entries upon the organization referred to as the Chuchawalla Valley California Development District with which A. Y. Satterfield is associated and of which Orson Holt is a member of the Board of Directors. However, they have furnished no showing that the company or association owns or controls the necessary facilities to make water delivery to the lands or that the appellants own any stock or other interest in the organization. See 43 CFR, 1954 ed., 232.33(b). Moreover, the Department has held in William C. Stayt, 37 L.D. 332, 334 (1908) that even a contract to make delivery of the water is insufficient unless the probability of an irrigation scheme is demonstrated by an actual test. The Stayt case also held that in the absence of a showing of actual, tangible work, in the way of an irrigation system, on an entryman's claim, there is no ground upon which relief may be invoked.

The appellants have not shown that an extension of time is justified in the circumstances or that failure to reclaim the land within the ordinary entry period was due to any reason that could not have been readily foreseen. Therefore, the requests for extension of time are denied. See 43 CFR, 1954 ed., 232.37.

The entries terminated by operation of law on April 21, 1959. Since the records in these cases clearly show that the requirements of law have not been met, the entries should be canceled. Adverse proceedings are unnecessary. United States v. Evan R. Jensen, A-26486 (December 2, 1952).

Therefore, the requests for extensions of time are denied and the entries are canceled.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be computed on the basis of $5 for each Desert Land Entry included in the appeal. If the appeal covers all entries adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Mr. Joseph S. Holt (Certified Mail)
Mrs. Rose J. Holt (Certified Mail)
Hon.D. S. Saund, House of Representatives
Lands Staff Officer
Appeals List No. 1
Classification file No. 1
CFG

69854-60

appeal to Sec.

LO(Sc)

DOCKET FILES

DESERT LAND * 2 Application

A desert land applicant must file with his desert land application plausible presumptive evidence that water is available for the irrigation of the land, a map of the proposed irrigation development plan and such other supporting data as required to reasonably demonstrate that the lands are susceptible of development by some practical means, and a showing as to the character of the land itself.

* 3 Classification

A desert land application is properly rejected where all of the water in the drainage involved is already committed to use for the irrigation of lands now under irrigation.

Frances E. Auen, Los Angeles 0150253 (March 3, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0150253
5.04g

March 3, 1960

Certified Mail
Return Receipt Requested

DECISION

Frances E. Auen : Desert Land Application

Decision of the Chief, Land Adjudication Unit, Affirmed

Frances E. Auen has appealed from a decision of the Chief, Land Adjudication Unit, May 20, 1959, which rejected her desert land application because she did not submit with her application a proper showing as to source of water supply, plan of irrigation, and description of the character of the land as contemplated by the regulations in 43 CFR Part 232.

The regulation 43 CFR 232.14 provides that at the time of filing application with the Manager, the applicant must submit a map of the proposed development and a summary statement of facts demonstrating that an adequate water supply is available for the irrigation of the land* and that the land is of a character suitable for irrigated crop production. See Richard G. Peeples, 48 L.D. 554 (1922). He must also submit a plan of the proposed irrigation development completed in sufficient detail to reasonably demonstrate that the lands are susceptible of irrigation by some practical means. See Martha K. Bongfeldt et al., Los Angeles 0150912, approved September 25, 1959. In the absence of plausible presumptive evidence that the land is susceptible of reclamation by some practical means, a desert land application must necessarily be rejected. See June C. Keane, A-27847 (February 17, 1959).

The applicant submitted with her application nothing more than a sketch map showing the boundaries of the tract and the proposed location of a well. By her appeal the appellant states in applicable part as follows:

---

* In the case of Mullen v. Keaster, 44 L.D. 161 (1915), the Department stated in applicable part that the Desert Land Act contemplates that an entryman thereunder shall show a permanent and feasible source of water supply sufficient to irrigate all of the land entered or as much thereof as is susceptible of irrigation and to keep it permanently irrigated.

> "The facts are: Since my filing, water has been developed by the drilling of four wells ½ mile south of my filing. Water strata at 37' and another at 80'. I feel sure that we will hit the same strata. Therefore, I am more than anxious that you reconsider my filing."

Such a statement unaccompanied by any information concerning the size or other dimensions and characteristics of the wells reported is no persuasive evidence that water is available in amounts required for irrigation or that the lands are susceptible of irrigation development by any practical means. See Georgia Blaine et al., Los Angeles 0153231, etc. (September 25, 1959).

Moreover, the record reveals that the lands are located in the Amargosa River Drainage of the Amargosa Desert Area. The most competent geological information available to this office reveals that the rate of recharge to the drainage area does not exceed about 10,000 acre feet per annum and that the water requirements for the irrigation of lands embraced by patented desert land entries together with outstanding unpatented entries already exceed the annual rate of recharge to the whole drainage area. In the circumstances, no further desert land applications can be properly allowed. See Peter W. Breene et al., Los Angeles 0148894, etc., approved September 25, 1959.

Therefore, the decision of the Chief, Land Adjudication Unit, is affirmed.

Mrs. Frances E. Auen is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Mrs. Frances E. Auen (Certified Mail)
Lands Staff Officer
Appeals List No. 1
CFG

DOCKET FILES (ac)

DESERT LAND * 1 Generally (Reinstatement)
* 4 Proof (Extensions of Time

The effect of a reinstatement is to revive the old entry with all of the attendant rights and priveleges which have accrued from its inception.

The construction of a well, with an intent to procure water for the reclamation of a desert land entry, is construction of the irrigation works within the contemplation of the act of March 28, 1908. Failure, after diligent effort to obtain water in this manner, may be a sufficient ground for an extension of time to perfect an entry.

James Edwin Witt, Los Angeles 088532 (March 9, 1960)

In reply refer to:

Los Angeles 088532
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 9, 1960

DECISION

James Edwin Witt : Desert Land

Decision Reversed, Case Remended

Mr. James Edwin Witt has appealed from a decision dated November 2, 1959, rejecting his application for an extension of time within which to submit final proof and cancelling his desert land entry.

The appellant's desert land entry was allowed February 14, 1950, and adequate annual proofs were submitted for the initial three years of the entry period. On January 23, 1954, the appellant requested an extension of his entry, but before action could be taken on this request a notice of intention to make final proof was filed by him. Nevertheless, the appellant took no action toward making final proof and an expiration notice was issued February 24, 1956. Shortly, thereafter, July 23, 1956, the appellant filed a request for reinstatement of his entry, alleging that he had inadverently allowed the entry to expire due to his unfamiliarity with the appropriate procedures, and a reinstatement was subsequently granted on August 15, 1956. On November 13, 1956, the appellant filed final proof with the Land Office which was rejected as inadequate on November 3, 1958, and the entry held for cancellation.

On February 27, 1959, the appellant filed a request for an extension of time within which to perfect his entry, alleging that a well, constructed on the land with the intent to procure water for reclamation of his entry at a cost of $6,500, had "silted up" due to faulty workmanship during drilling operations. He stated that arrangements had been made to drill a new well and submitted a letter from a local bank stating that financing would be available if a reasonable extension of the entry were to be allowed.

This application for extension was rejected by a decision dated November 2, 1959, to which the appeal is directed. In this decision it was held that an unavoidable delay in the construction of irrigation works intended to convey water to the land is the only ground upon which such relief may be granted, and that since the appellant had reported his irrigation works as completed there could be no extension based on defects occuring after this time. An additional ground for rejecting the requested extension was that it was not timely filed.

The administrative requirement of filing within a prescribed time in appropriate instances may be waived. Cf. *Austin B. Smith, Appellant, Rulon K. Neilson Intervener*, A-26368 (September 30, 1952). The effect of the reinstatement of Mr. Witt's entry on August 15, 1956, was to revive the old entry with all of the attendant rights and privileges which had accrued from its inception in 1950, *Bruce Sweeney*, A-27854 (March 4, 1959); Cf. *Romance Lode Mining Claim*, 31 L.D. 51 (1901, and an entry is not to be cancelled for defects not appearing on the face of the record without giving the entryman an opportunity to be heard. *Claude E. Crumb*, 62 I.D. 99 (1955). Since the appellant contended that he had complied with all of the requirements of the desert land act, and there is nothing of record to show compliance with the procedure to be followed by the Government in seeking the cancellation of an entry, 43 CFR, Part 221, as amended, it must be held that the cancellation of Mr. Witt's desert land entry was unauthorized. Cf. *Johnnie E. Whitted, Bill Smith*, 61 I.D. 172 (1953).

The mere fact that an entryman has unsuccessfully attempted to make final proof does not prevent him from applying for and obtaining extensions of time within which to perfect his entry. Cf. *Hazel, Assignee of Patterson*, 43 L.D. 644 (1932). The Department has held that the construction of a well, with an intent to procure water for the reclamation of a desert land entry, is construction of irrigation works within the contemplation of the acts of March 28, 1908, April 30, 1912, and February 12, 1925, (43 U.S.C. 333, 334, and 336). Failure, after diligent effort to obtain water in this manner is sufficient ground for extensions of time as provided by these acts. *Fred Steininger*, 43 L.D. 189 (1914); *Bertha Early Robinson*, 43 L.D. 241 (1914).

The above cited acts provide for consecutive extensions of as long as three years each where, by reason of some unavoidable delay in the construction of the irrigating works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation within the initial four years. 43 CFR 232.37. In the light of the unusual amount of delay which has occurred in this case, it is apparent that the maximum time allowable under the three acts cited must be granted if Mr. Witt is to benefit from an extension of his entry. Under the provisions of these acts, final proof will, therefore, be required on or before February 14, 1963. There are no provisions for extensions beyond that time.

The decision below is, accordingly, reversed and the case is remanded to the Manager through appropriate channels for allowance of extensions as outlined above.

Acting Director

DISTRIBUTION:

Mr. James Edwin Witt (Regular Mail)
Lands Staff Officer
Appeals List No. 1
LLM

LO(de)

In reply refer to:
Los Angeles 0145092 etc. 1/
0151065 etc. 2/
5.04g

DOCKET FILES

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 11, 1960

DECISION

Frances Elizabeth Cain et al. : Desert Land Applications
Nick P. Leko et al. :

Decisions Modified, Lands Classified

This decision supplements the decisions in Frances Elizabeth Cain et al., Los Angeles 0145092 etc., and Nick P. Leko et al., Los Angeles 0151065 etc., both approved June ~~24~~ 18, 1959.

All of the public lands in the following townships are hereby classified as unsuitable for agricultural development:

Mount Diablo Meridian

Tps. 31 and 32 S., R. 38 E.
Tps. 27 and 29 S., R. 39 E.
Tps. 31 and 32 S., R. 41 E.
Tps. 31 and 32 S., R. 42 E.
T. 32 S., R. 43 E.
T. 32 S., R. 44 E.

San Bernardino Meridian

Tps. 13 and 14 N., R. 9 E.
T. 16 N., R. 11 E.
T. 17 N., R. 12 E.
T. 2 N., R. 17 E., partly unsurveyed.
Tps. 2, 3, and 4 N., R. 18 E.
Tps. 1, 2, 4, 5, 6, and 7 N., R. 19 E.
Tps. 7, 8, 10, 11, and 12 N., R. 1 W.
Tps. 7, 8, 9, and 10 N., R. 2 W.
Tps. 7, 8, 10, and 12 N., R. 3 W.
Tps. 8, 9, and 10 N., R. 4 W.
Tps. 8, 9, 10, and 11 N., R. 5 W.
Tps. 8, 10, 11, and 12 N., R. 6 W.
Tps. 8, 11, and 12 N., R. 7 W.
T. 3 S., R. 15 E.

San Bernardino Meridian (Continued)

Tps. 4 and 5 S., R. 15 E., partly unsurveyed.
Tps. 3, 4, and 5 S., R. 16 E., partly unsurveyed.
Tps. 1 and 2 S., R. 17 E., partly unsurveyed.
T. 3 S., R. 17 E.
Tps. 5 and 6 S., R. 17 E., partly unsurveyed.
Tps. 1, 6, and 7 S., R. 18 E.
Tps. 1 and 2 S., R. 19 E., partly unsurveyed.
T. 6 S., R. 19 E.
T. 7 S., R. 19 E., partly unsurveyed.
Tps. 1, 2, 3, and 6 S., R. 20 E., partly unsurveyed.
T. 7 S., R. 20 E.
T. 1 S., R. 21 E., partly unsurveyed.
T. 2 S., R. 21 E.
Tps. 3, 5, and 6 S., R. 21 E., partly unsurveyed.
Tps. 1 and 2 S., R. 22 E., partly unsurveyed.
T. 5 S., R. 22 E.

Until further notice any agricultural application (including without limitation homestead and desert land applications) which may hereafter be received for any of the above-described public lands will not be accepted for filing but will be returned to the applicant, accompanied by a notice stating that the lands have been classified as unsuitable for further agricultural entry and that no right of appeal lies from the refusal to accept the application for filing.

A notice in accordance with the above giving the basis for the classification and the effective date thereof will be published in the Federal Register (Notices Section).

Edward Woozley
March 21, 1960 Director

Approved:
Roger Ernst
Assistant Secretary of the Interior

DISTRIBUTION:

Lands Staff Officer (1)
Appeals List No. 1
Classification Files
CFG

LO(Sac)

DOCKET FILES

DESERT LAND * 4 Proof

The requirement that annual expenditures and proof must be made as provided by the desert land law and regulations published thereunder is mandatory. There is no authority to extend the time within which annual expenditures must be made and proof furnished.

Extensions of time within which to submit final proof may be granted only where the failure to reclaim and cultivate the land was due to no fault on the part of the entryman but to some unavoidable delay in the construction of the irrigation works intended to convey water to the land for which he was not responsible and could not have forseen.

Robert L. Clark, et al., Los Angeles 096384, etc. (March 14, 1960)

In reply refer to:

Los Angeles 096384
096385
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 14, 1960

Certified Mail
Return Receipt Requested

DECISION

Robert L. Clark :
Alma W. Clark : Desert Land Entry

Decision Affirmed

Mr. Robert L. Clark and Mrs. Alma W. Clark have appealed from a decision of the Chief, Lands Adjudication Unit requiring them to show cause, within 90 days, why their desert land entries should not be canceled for noncompliance with the requirements of the Desert Land Act (43 U.S.C., 1958 ed., 321-339; 43 CFR 232).

The appellants' desert land applications were allowed January 6, 1955, and, in due course, first and second annual proofs were filed with the Land Office. Although the amount of $3.00 per acre had not been expended in reclaiming and improving the land, see 43 CFR 232.24, the appellants failed to submit annual proof for the third year of the entry and have failed to submit final proofs as required by the Desert Land Act, supra.

With an exception not pertinent to this case, the requirement that annual expenditures and proof must be made as provided by the desert land law and regulations published thereunder is mandatory. There is no authority to extend the time within which such expenditures must be made and proof furnished. 43 CFR 232.23; Durward E. Fry, 43 L.D. 172 (1916). Thus, since the appellants have failed to submit annual proof for the third year of their entries, their desert land applications are subject to cancellation for this reason alone.

In addition, the law and regulations provide that extensions of time within which to submit final proof may be granted only where the failure to reclaim and cultivate the land was due to no fault on the part of the entryman but to some unavoidable delay in the construction of the irrigation works intended to convey water to the land for which he was not responsible and could not have forseen. The entryman must also show that he has complied with the law as to annual expenditures and proof. 43 CFR 232.37; Cf. Edwin M. Dillhoefer, A-25909 (November 8, 1950).

Since the reasons for requesting an extension submitted by appellants do not meet the requirements of the law and regulations, the decision of the Chief, Lands Adjudication Unit must be affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00 for each desert land entry included in the appeal. If the appeal covers all entries adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Robert L. Clark(Certified Mail)
Mrs. Alma W. Clark (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LLM

appeal to Sec
affirmed A-28466 - 11-25-60
(Old)

DOCKET FILES

DESERT LAND * 4 Proof: Extension of Time

The inability because of inadequate financial means of a desert land entryman to construct a well during the entry period is not a proper ground for allowing an extension of time to submit final proof.

Ethel R. Henry, Los Angeles 096435 (March 23, 1960)

RD

In reply refer to:

Los Angeles 096435
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 23, 1960

Certified Mail
Return Receipt Requested

DECISION

Mrs. Ethel R. Henry : Desert Land Entry

Decision of the Manager Affirmed

Mrs. Ethel R. Henry has appealed from a decision dated January 8, 1960, rejecting her application for an extension of time within which to complete the development of and submit final proof on her desert land entry.

Mrs. Henry states that her husband, Ernest Kruger, died 8 months after her entry was allowed, and that she was therefore unable to raise immediate cash for the drilling of a well and the construction of irrigation works upon her entry. The appellant married Eugene Henry on February 20, 1959, and avers that she has been able to make arrangements which, if an extension of time could be granted, would permit her to construct the necessary improvements upon her entry.

The basis for the request for an extension of time thus appears to be the appellant's inadequate financial means to irrigate the entry during the five year period following the allowance of the entry.

The statute authorizing an extension of time for submitting final proof for desert land entries is 43 U.S.C., 1958 ed., sec. 333, which states that:

> "Any entryman * * * who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of /the Desert Land Act/, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said section, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said sections of the completion of said work."

The language of this act, and its legislative history, clearly show that it was designed to permit an extension of time for submitting final proof when a delay occurred off the land in the construction of irrigation works intanded to bring water to the land. 42 Congressional Record 1988 (1908). When the act was passed, the most common method of obtaining water for irrigation was to divert the flow of a stream or river, rather than to tap underground waters, which were then little known or understood.

Nevertheless, it was recognized at an early date, in John S. Tendick, 37 L.D. 332 (1908), that this act could permit an extension of time for constructing irrigation works even where those works would depend entirely upon underground water, and would thus require nothing to be done off the land. However, in that same case it was held that there may not be an extension where there was delay in beginning construction, but an extension only where, construction having begun, an obstacle is met which prevents the timely completion of the irrigation system. And, as is clear from the background and purposes of the statute, the type of obstacle which will jusitfy an extension is not an unforeseen change in the health or circumstances of the entryman, but an unforeseen encounter with a condition of the land which makes the construction of the irrigation works more difficult or expensive than anticipated. James T. Fulton, Arizona 02901 (March 9, 1960). Failure to construct the irrigation works because of lack of money may be perfectly understandable, and, indeed, reasonable, but it is not an "unavoidable delay" within the meaning of the statute. Cf. Edwin M. Dillhoefer, A-25909 (November 8, 1950). A contrary holding would result in the adjudication of cases in accordance with each entryman's financial condition, and would permit of no uniform rule concerning the cases in which relief may be given. Elizabeth McGlothern, 46 L.D. 40 (1917).

Mrs. Henry's application for an extension, accordingly, does not come within the purview of the statute, and was properly rejected. The decision of the Manager is affirmed.

After this decision becomes final, the Land Office shall notify the appellant of the expiration of the final proof period, and shall require her to submit final proof within 90 days of her receipt of the notice. 43 CFR 232.34

Mrs. Henry is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. These regulations are reprinted on Form 4-1365, a copy of which is enclosed. If an appeal is taken, the amount of the filing fee will be $5.00. In taking an appeal, there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure
(distribution on pg. 3)

DISTRIBUTION:

Mrs. Ethel R. Henry (Certified Mail)
Mr. Louis R. Deadrich Attorney (Certified Mail)
Hon. Thomas H. Kuchel, United States Senate
Hon. Clair Engle, United States Senate
Hon. John E. Moss, House of Representatives
Hon. James B. Utt, House of Representatives
Hon. D. S. Saund, House of Representatives
Lands Staff Officer
Appeals List No. 1
MG

L D Sec)

DOCKET FILES

DESERT LAND * 2 Application

* 3 Classification

A desert land applicant must submit with his application plausible presumptive evidence that water is available for the irrigation of the land, the land is of a character suitable for crop production, and a plan of irrigation completed in sufficient detail to reasonably demonstrate that irrigation of the land is feasible by some practical means.

A desert land application is properly rejected where there is no satisfactory evidence that water is available for the irrigation of the land.

John Paul Flaming et al., Los Angeles 0158979 (March 23, 1960)

In reply refer to:
Los Angeles 0158979
0158980
0158981
0158982
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 23, 1960

Certified Mail
Return Receipt Requested

DECISION

John Paul Flaming :
Norma C. Flaming : Desert Land Applications
Audrey Evans :
Dick G. Evans :

Decisions of the Chief, Land Adjudication Unit Affirmed

John Paul Flaming, Norma C. Flaming, Audrey Evans and Dick G. Evans have appealed from decisions of the Chief, Land Adjudication Unit which rejected their desert land applications for the stated reasons that they were not accompanied by proper showings as contemplated by the regulations in 43 CFR, 1954 ed., Part 232.

The regulation 43 CFR 232.14 provides that at the time of filing an application with the Manager, the applicant must submit a map of the proposed development and a summary statement of facts demonstrating that an adequate water supply is available for the irrigation of the land 1/ and that the land is of a character suitable for irrigated crop production. See Richard G. Peeples, 48 L.D. 554 (1922). He must also submit a plan of the proposed irrigation development completed in sufficient detail to reasonably demonstrate that the lands are susceptible of irrigation by some practical means. See Martha K. Bongfeldt et al., Los Angeles 0150912 etc., approved September 25, 1959.

The appellants submitted no evidence that water is available in amounts required for the irrigation of the lands. They assert on appeal that they could submit no evidence of water as no such information is available in the locality. However, U.S. Geological Survey reports reveal that although there are a number of wells in the drainage none of them produce sufficient water for irrigation and that the possibility of securing water for that purpose is very remote. In the circumstances, a desert land application could not be properly allowed. See Richard G. Peeples, supra.

1/ In the case of Mullen v. Keaster, 44 L.D. 161 (1915), the Department stated in applicable part that the Desert Land Act contemplates that an entryman thereunder shall show a permanent and feasible source of water supply sufficient to irrigate all of the land entered or as much thereof as is susceptible of irrigation and to keep it permanently irrigated.

Furthermore, the record reveals that 50,000 or more acres in Piute Valley have already been patented. However, there is no record of any agricultural developments on any of these patented, privately owned lands. See Peter W. Breene et al., Los Angeles 0148894 etc., approved September 25, 1959. In the absence of a showing that water is available and that development of the land for agricultural purposes is feasible by some practical means a desert land application cannot be properly allowed. See June C. Keane, A-27847 (February 17, 1959).

Therefore, the decisions of the Chief, Land Adjudication Unit are affirmed.

The four appellants listed above are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR, Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each desert land application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee will be $20.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:

Mr. John Paul Flaming (Certified Mail)
Mrs. Norma C. Flaming (Certified Mail)
Mrs. Audrey Evans (Certified Mail)
Mr. Dick G. Evans (Certified Mail)
Lands Staff Officer
Appeals List No. 1
CFG

LO (Sac)

DOCKET FILES

DESERT LAND * 2 Applications
* 3 Classification

Where a desert land application was rejected on the ground that the applicant failed to demonstrate the feasibility of reclaiming the land for profitable irrigated agriculture and it appears that the applicant in trespass has already obtained water and produced crops on the land and has satisfied the Government's trespass claim, the case will be remanded for further consideration.

Mrs. Verna V. Kennedy, Los Angeles 0119679 (April 4, 1960)

Rd

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Los Angeles 0119679
5.04g

April 4, 1960

DECISION

Mrs. Verna V. Kennedy : Desert Land

Case Remanded

Mrs. Verna V. Kennedy has appealed from a decision of the Chief, Lands Adjudication Unit, dated November 3, 1959, rejecting her desert land application. The decision recites that the appellant has not made an adequate showing of the feasibility of reclaiming the land for profitable irrigated agriculture.

It appears, however, that the appellant has been cultivating the land in trespass for several years, that an eight inch well has been drilled on the land and a pump installed at a cost of $7,000, and that an additional $5,000 has been expended in improving the land. The appellant states that the land has already produced some "good" crops.

Trespass action was initiated against the appellant's unauthorized use of the land. That action has been settled, and the State Supervisor has recommended that the entry be allowed.

This recommendation and the appellant's assertions appear to be consistent with a report of January 7, 1959, which classified the land as agricultural in character and proper for the production of agricultural crops. The classification report states that sufficient water is apparently available for the successful production of agricultural crops, that the land is not mineral in character, and that it is not needed for retention in Federal ownership.

For the above reasons, the decision appealed from is reversed and the case remanded to the Manager through the Assistant to the State Supervisor at Los Angeles for further consideration and appropriate action.

For the Director:

E. H. Dunn

DISTRIBUTION:
Mrs. Verna V. Kennedy (Regular Mail)
Lands Staff Officer
Appeals List No. 1
LLM

appeal to Sec
affirmed A-28503
7-25-60

L E (Sec)

DOCKET FILES

DESERT LAND * 1 Generally

RULES OF PRACTICE * 6 Hearings

* 11 Statement of Grounds

Dismissal of an appeal is mandatory where no statement of reasons is filed within the alloted time for filing this document.

An applicant for a desert land entry is not entitled as a matter of right to a hearing to determine the proper classification of the land applied for.

Ethel B. Spiller et al., Los Angeles 0152083, etc. (April 7, 1960)

Ro

In reply refer to:
Los Angeles 0152083
0152084
0153101
0153102
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 7, 1960

Certified Mail
Return Receipt Requested

DECISION

Ethel B. Spiller et al. : Desert Land

Appeals Dismissed

Mrs. Ethel B. Spiller and Mr. Earl Spiller have appealed from a decision of the Chief, Lands Adjudication Unit, dated October 28, 1959, rejecting their applications for desert land entry and for special land use permits. Notices of appeal were filed on November 30, 1959, but no statements of reasons have been filed in support of their appeals and the time for filing these statements has expired. (43 CFR, 1958 Supp., 221.3).

The dismissal of an appeal for failure to file a statement of reasons within the required time is mandatory. 43 CFR, 1958 Supp., 221.98; Charles L. Wallace et al., A-27506 (December 12, 1957).

The appellants, with their notices of appeal, filed requests for a hearing to present evidence. These requests must be denied. There is no provision in the rules of practice for hearings on appeals, and there is no statutory or regulatory requirement for any hearing in cases involving the propriety of classification of lands under the Desert Land Act (43 U.S.C. 321 et seq.) because such classifications are within the discretionary authority of the Secretary. Leonard E. Noren, Harry C. Perry, A-27147 (August 1, 1955); Paul B. and Ruth M. Butler, A-27634 (August 26, 1958).

Therefore, the appeals are dismissed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each application included in the appeal. If the appeal covers both applications adversely affected by this decision, the filing fee is $10. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure
Distribution p. 2

71918-60

DISTRIBUTION:

Mr. William Blair Dalbey, Attorney (Certified Mail)
Mrs. Ethel B. Spiller (Regular Mail)
Mr. Earl Spiller (Regular Mail)
Lands Staff Officer
Appeals List No. 1
LLM

DOCKET FILES

DESERT LAND * 2 Applications

RULES OF PRACTICE * 11 Statement of Reasons

Appeals will be summarily dismissed where the appellants file no statement of reasons for their appeals.

Dinah D. Rocke, et al., Los Angeles 0152480, etc. (April 7, 1960)
Approved May 9, 1960 by Assistant Secretary of the Interior Roger Ernst

In reply refer to:

Los Angeles 0152480, etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 7, 1960

DECISION

Dinah D. Rocke, et al. : Desert Land Applications

Appeals Dismissed

Mrs. Dinah D. Rocke and 11 others listed in the Appendix have appealed from decisions of the Los Angeles, California, Land Office rejecting their desert land applications because the applicants did not meet the minimum requirements of the regulations for evidence demonstrating the feasibility of reclaiming the lands under application for profitable irrigated agriculture.

The applicants listed in the Appendix have failed to file statements of reasons in support of their notices of appeal. The provisions of 43 CFR, 1958 Supp., 221.98 require the summary dismissal of an appeal where no supporting statement of reasons is filed as required by the regulation 43 CFR, 1958 Supp., 221.3.

Therefore, the appeals of the applicants listed in the attached Appendix are dismissed.

Edward Woozley
Director

Approved: May 9, 1960

Roger Ernst
Assistant Secretary of the Interior

DISTRIBUTION:

Each applicant listed in Appendix (Regular Mail)
Lands Staff Officer
Appeals List No. 1
LLM

A P P E N D I X

Name	Los Angeles Land Office Serial No.
Dinah D. Rocke	0152480
Bernard D. Rockman	0154633
Dorothy Olive Marcus	0159918
Lena Evelyn Thomas	0159929
Gladys Metcalf Eddy	0159962
Juanita D. Weed	0161382
James Doyle Weed	0161383
Clois E. Weed	0161385
Clifford E. Bell	0161553
Barbara J. McGehee	0161667
Arrie B. Covington	0160867
Chuck Ayars	0155865
[illegible]	[illegible]

LD (Sec)

DOCKET FILES

DESERT LAND * 1 Generally

A purchaser of an unredeemable tax-sale title to land sold by a State irrigation district because of delinquent assessment charges receives no patent to the land under the act of August 11, 1916 (43 U.S.C. 623) unless or until all of the requirements for patent under that act have been met.

Lands within an approved irrigation district under the 1916 act are not affected by a subsequent reclamation withdrawal and a purchaser of an unredeemable tax title from an irrigation district or qualified assignee may file application for patent to the lands under sec. 6 of the 1916 act in accordance with the regulations in 43 CFR, 1954 ed., 231.19, 231.20.

* 4 Proof (extension of time)

An entryman who has obtained three extensions of time to make final proof under the acts of 1908, 1912, and 1915 which extended the entry to February 2, 1928 is not now entitled to an additional extension at this time under the act of February 25, 1925 (43 U.S.C. 336) to February 1, 1931 as that time has now passed.

(April 13, 1960)

Clytie Bowles McPherson et al., Los Angeles 039230

In reply refer to:

Los Angeles 039230
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 13, 1960

Certified Mail
Return Receipt Requested

DECISION

Mrs. Clytie Bowles McPherson
Irving Hill : Desert Land Entry
:
:

Decision of the Chief, Land Adjudication Unit, Affirmed as Modified, Case Remanded

Mrs. Clytie Bowles McPherson has appealed from a decision of the Chief, Land Adjudication Unit, of May 28, 1959, which allowed Mrs. McPherson 90 days from receipt of the decision in which to submit final proof under the Desert Land Act subject to penalty of cancellation of the entry. The decision refused to recognize an assignment of the entry from Mrs. McPherson to Irving Hill who had obtained a quit claim deed from Mrs. McPherson.

Mrs. McPherson has appealed and asserts that she purchased the land from the Imperial Irrigation District [1] and understands from the District that she has a good and sufficient title to the land. However the record shows that Mrs. McPherson is the heir of the now deceased entryman, Henry C. Bowles, whose entry of the land was allowed on October 9, 1913, which entry has never been canceled as to the lands here involved. [2] Though the sales proceedings by the District which quitclaimed the land to Mrs. McPherson were in accordance with State laws and procedures governing the disposal of public lands in State irrigation districts, no patent can be issued under the act of August 11, 1916 (43 U.S.C. 621 et seq.) [3] unless or until all of the requirements for patent under that act have been met. See Glen L. Kimmel and Goshen Irrigation District, 53 I.D. 658 (1932).

---

[1] The lands are situated within the boundaries of the Imperial Irrigation District, a State irrigation district, approved February 6, 1921.

[2] The entry was canceled in part by decision of the Manager of March 20, 1951, because Ed Eldridge had purchased the land by tax deed from the Imperial Irrigation District. See departmental decision in Clytie McPherson, A-26440 (October 25, 1954).

[3] Commonly referred to as the Smith Act.

The record indicates that the entry was allowed October 9, 1913, a[illegible] that the entryman was granted extensions of time to make final proof under the acts of March 28, 1908; April 30, 1912; and March 4, 1915 (43 U.S.C. 333-335). The entry was not suspended under the decision in the case of Maggie L. Havens, A-5580 (October 11, 1923) as the Havens case, supra, applies to lands withdrawn as a part of a Federal reclamation project pursuant to the Act of June 17, 1902 (43 U.S.C. 416) and acts amendatory thereof or supplementary thereto. Though the lands here involved were included in the area withdrawn by the first form reclamation withdrawal of October 19, 1920, as a part of the Yuma project, the land was included in the Imperial Irrigation District, a State irrigation district, under the 1916 act pursuant to an application filed February 27, 1918. Thus, the subsequent reclamation withdrawal of October 19, 1920, did not attach to the land and the Havens case, supra, which suspended entries withdrawn in connection with the Yuma project does not apply to the present case. 4/ Accordingly, it appears that the entry terminated on February 2, 1928. Since the 90-day period granted by the Bureau's decision of May 28, 1959, has now expired and final proof has not been submitted, the entry must be cance[illegible].

Mrs. McPherson urges in her appeal that she be granted an extension of time in which to complete the necessary land developments to comply with the final proof requirements of the Desert Land Act. The record reveals that the entryman has been granted extensions under the three acts cited above which extended the life of the entry to February 2, 1928. Though the entryman would have been entitled to an additional three year extension under the Act of February 25, 1925 (43 U.S.C. 336) which would have extended the life of the entry to February 1, 1931, that time is now passed. See Donald K. McLennan, 53 L.D. 21 (1950). Moreover, it appears that claimants under the entry have all these years enjoyed a suspension of the entry because of an erroneous interpretation of the applicability of the Havens case to the lands situated within the limit of the Imperial Irrigation District.

The record reveals that the Imperial Irrigation District acquired tax title for nonpayment of assesment charges under State law on December 5, 1939, and by quitclaim deed dated July 31, 1951, conveyed the land to Mrs. McPherson, daughter and heir of the original entryman. Accordingly, there was nothing to prevent Mrs. McPherson as purchaser of an unredeemable tax title under the 1916 act or a qualified assignee from filing application for patent to the lands under sec. 6 of the 1916 act in accordance with the regulations in 43 CFR, 1954 ed., 231.19, 231.20.

Therefore, desert land entry Los Angeles 039230 is hereby canceled and the case is remanded to the Manager, through the Bureau's Asst. to the State Supervisor. Since it appears from the record that Mrs. McPherson has quitclaimed her interest in the land to Irving Hill, he should be advised that if he cares to do so he may file a proper application for cash entry under sec. 6 of the 1916 act.

4/ See Bill Fults, 61 I.D. 437 (1954).

Mrs. Clytie Bowles McPherson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:
Mrs. Clytie McPherson (Certified Mail)
Mr. Irving Hill (Regular Mail)
Lands Staff Officer
Appeals List No. 1
CFG

LO(Se)

DOCKET FILES

DESERT LAND * 2 Application

An applicant for public lands under the Desert Land Act must file with his application a showing concerning the character of the lands under application, evidence of water available for the irrigation of the lands, and a plan of irrigation completed in sufficient detail to reasonably demonstrate that the lands are susceptible of irrigation by some practical means.

* 3 Classification

Before a desert land application can be properly allowed the lands must be classified as proper for such disposal pursuant to the provisions of Section 7 of the Taylor Grazing Act. Such classification may properly consider the over-all effect the classification will have on the public interest.

RULES OF PRACTICE * 6 Hearings

A hearing is not held as a matter of course in land classification matters and a hearing will not be held in the absence of a showing that a hearing if held would develop facts decisive of the issues involved.

Rasmus J. Rasmussen, Los Angeles 0160844 (April 18, 1960)

Ro

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0160844
5.04g

April 18, 1960

Certified Mail
Return Receipt Requested

DECISION

Rasmus J. Rasmussen : Desert Land Application

Decision of the Manager Affirmed

Rasmus J. Rasmussen has appealed from a decision of the Manager of March 24, 1959, which rejected his application for the stated reason that it was not accompanied by proper showings as contemplated by the regulations 43 CFR, 1954 ed., Part 232.

The regulations 43 CFR 232.14 provide that at the time of filing application with the Manager, the applicant must submit a map of the proposed development and a summary statement of facts demonstrating that an adequate water supply is available for the irrigation of the land 1/ and that the land is of a character suitable for irrigated crop production. See Richard G. Peeples, 48 L.D. 554 (1922). He must also submit a plan of the proposed irrigation development completed in sufficient detail to reasonably demonstrate that the lands are susceptible of irrigation by some practical means. See Martha K. Bongfeldt et al., Los Angeles 0150912, approved September 25, 1959, and cases cited.

In the present case the application submitted shows that the appellant proposes to drill a well and irrigate the land by means of a sprinkler irrigation system. However, there has been no showing that the distribution system proposed or the well is sufficient for the irrigation of all of the irrigable lands embraced by the entry. The assertions of the appellant that there is a well on Shavers Summit in sec. 10, T. 6 S., R. 12 E., and that the Cottonwood Spring is located in sec. 14, T. 5 S., R. 11 E., are accompanied by no showings as to the output of the alleged

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1/ In the case of Mullen v. Keaster, 44 L.D. 161 (1915), the Department stated in applicable part that the Desert Land Act contemplates that an entryman thereunder shall show a permanent and feasible source of water supply sufficient to irrigate all of the land entered or as much thereof as is susceptible of irrigation and to keep it permanently irrigated.

well or the spring or other information bearing on the sufficiency of a water supply for the irrigation of the lands at the location here involved, see Dottie J. Beck et al., A-27884 (March 5, 1959), or that the lands are susceptible of irrigation by any feasible means. See June C. Keane, supra.

The record also reveals that the lands are located in the vicinity of the Joshua Tree National Monument where real estate values are very high. The lands here involved are intersected by U. S. Highway 60-70 which is the main highway route from east to west through this section of California. The lands must be classified for agricultural purposes before a desert land entry can be properly allowed. Helen C. Smith et al., A-26968, etc. (March 4, 1955). Such classification may properly consider the value of the land for other purposes as well as the purpose for which the land is sought. See Nelson A. Gerttula, 64 I.D. 225 (1957). The decision as to whether the lands should be disposed of under the desert land laws, or some other law, or not at all is within the discretion of the Secretary based on an analysis of the over-all public interest in the classification. See Ernest C. DeFord et al., A-26591, etc. (February 6, 1953) and cases cited. Thus, on the basis of the present record it appears that the lands could not be properly classified as suitable for desert land entry.

The appellant asserts that he should be allowed a special land use permit to go upon the land and drill and explore for water. However, in the absence of plausible presumptive evidence that a water supply might be recovered in amounts required for irrigation, a special land use permit could not be properly allowed. See Peter W. Breene et al., Los Angeles 0148894, etc., approved September 25, 1959. Also, before a permit could be issued, the record would necessarily have to show the existence of the other conditions favorable to desert land entry classification and full compliance with the regulations.

As to the request for a hearing, a hearing is not held as a matter of right in classifying public lands. Cf. Leonard E. Noren et al., A-27147 (August 1, 1955). The appellants have had the opportunity to put into the record any information they desired. In Margaret A. Andrews et al., 64 I.D. 9 (1957) the Department stated that a hearing will not be granted where there is no reasonable likelihood that it would develop new facts decisive of the issues involved. Accordingly, the request for hearing is denied. The decision of the Manager is affirmed.

Mr. Rasmussen is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Acting Director

Enclosure

DISTRIBUTION:

Mr. William Blair Dalbey, Attorney (Certified Mail)
Mr. Rasmus J. Rasmussen (Regular Mail)
Hon. Thomas H. Kuchel, United States Senate
Lands Staff Officer (1)
Appeals List No. 1
CFG

DOCKET FILES

DESERT LAND * 2 Application

* 3 Classification

Refusal to classify lands for desert land entry is proper where the land has poor soil structure and drainage and economical cultivation of the land appears doubtful.

A desert land application should be rejected if the applicant does not adequately show that a sufficient supply of water for irrigation can be economically obtained.

Oliver F. Pearson, Sacramento 057450 (April 27, 1960)

In reply refer to:

Sacramento 057450
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 27, 1960

Certified Mail
Return Receipt Requested

DECISION

Oliver F. Pearson : Desert Land Entry

Manager's Decision Affirmed

Mr. Oliver F. Pearson has appealed from the decision of the Manager dated November 3, 1959 which rejected his and other desert land applications for the reason that the lands are not suitable for classification for agricultural purposes but should be classified for public sale or exchange.

Mr. Pearson contends that with a good well, alfalfa and other crops could be raised on the land although the growing season is short, and he states that winter grain, rye and alfalfa have been raised in the general area.

In support of his plan to obtain the water for irrigation by drilling a well and pumping the water from underground sources, appellant has mentioned several existing wells. One was drilled on a railroad right of way approximately two to two and one-half miles from the land applied for. The other was a well drilled by his brother about ten miles away. There is no indication that the conditions of lands on which the wells were drilled are similar to those of the subject land, or indeed that the wells have been used successfully for irrigation purposes. The Department has held in a case where there were wells six miles from the land that the existence of some wells in an area is not a basis for concluding that there would be sufficient water for irrigation of the other land. *Dottie J. Beck et al.*, A-27884 (March 5, 1959). A report of an examination of the land by the Bureau's field examiner indicates that in that general area, known as the Madeline Plains, there are only 26 acres which have been pump irrigated from wells. The condition and site of that land is much more favorable than the subject land. Other wells in the area have had varying success. It cannot be assumed that a well drilled on the land applied for would be successful and an adequate water supply assured, without a minimum showing by appellant as to the quality and quantity of water obtained from wells on land in the immediate area and having a similar nature to that applied for. Indeed, from the evidence in the record, a contrary assumption can be made. Further, appellant has not shown that his plan of obtaining water would be economically feasible. See Elizabeth Bullard et al., A-27242 (December 28, 1955). Therefore, as appellant has failed to submit satisfactory evidence that water is available or probably available to irrigate the land, the application is subject to rejection for this reason. June C. Keane, A-27847 (February 17, 1959).

The Manager's decision and the classification of the lands are based upon findings in the field examiner's report that the soil has a high concentration of salts sufficient to be injurious to plant growth, the structure of the soil is poor, and there is an extremely short growing season which would make farming in the area economically unfeasible.

With respect to the soil quality and structure, Mr. Pearson has submitted an analysis of samples of soil which he states were taken from the land applied for. That report would tend to indicate that the range of salt content in the soil may be satisfactory. However, it adds support to the finding that the soil is impervious and has poor drainage, by indicating that two of the samples are slow in percolation rate.

Contrary to Mr. Pearson's predictions of a profitable net return for the anticipated crop, the field examination report indicates that reasonable economic returns from crop production would be very doubtful. The appellant has not produced substantial evidence to sustain his burden of showing that the classification was erroneous. Juan M. Beltran et al., A-27808 (February 3, 1959). Therefore, as economical cultivation of the land appears doubtful, the classification of the land as unsuitable for agricultural purposes was proper. Helan C. Smith et al., A-26968, A-26969 (March 4, 1955). Accordingly, the decision rejecting the application is affirmed.

Mr. Pearson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:
Oliver F. Pearson (Certified Mail)
Lands Staff Officer
Appeals List No. 1
JB

DOCKET FILES

DESERT LAND * 2 Applications

RULES OF PRACTICE * 3 Extensions

A desert land applicant is required to make a definite showing as to the feasibility of reclaiming the lands under application for profitable irrigated agriculture.

After a decision has been rendered rejecting the showing made by a desert land applicant, an extension of time within which to file a statement of reasons for appeal will not be granted where the appellant merely wishes to obtain and submit information required to be filed at the time his desert land application was submitted.

Nelle W. Burk et al., Los Angeles 0155007 etc. (May 16, 1960)

L.O.
Sac.

In reply refer to:

Los Angeles 0155007
0155158
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 16, 1960

Certified Mail
Return Receipt Requested

DECISION

Nelle W. Burk and :
: Desert Land Applications
William A. Burk, Jr. :

Appeals Dismissed

The above-named parties have appealed from decisions of the Chief, Land Adjudication Unit, dated May 20, 1959, rejecting their desert land applications for the reason that they had failed to show the feasibility of reclaiming the lands for profitable irrigated agriculture.

The appellants state that their appeals, dated June 15, 1959, are "based upon a desire for additional time in which to obtain results from an investigation which is currently being conducted in conjunction with the property..." An examination of the matter, however, affords no justification for granting an extension for this purpose. The law and the regulations under which the appellants made application (43 U.S.C., 321 et seq.; 43 CFR 232) require a definite showing at the time the application is filed as to the feasibility of reclaiming the lands under application for profitable irrigated agriculture.

The appellants have not alleged any grounds upon which they contend that the decisions appealed from are erroneous and the appeals are, accordingly, dismissed. Cf. William C. Parson, A-27089 (April 12, 1955).

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be computed on the basis of $5 for each desert land entry included in the appeal. If the appeal covers all entries adversely affected by this decision the total filing fee will be $10. In taking an appeal, there must be strict compliance with the regulations.

For the Director:

Enclosure

DISTRIBUTION:
Mrs. Nelle W. Burk (Certified Mail)
Mr. William A. Burk, Jr., (Certified Mail)
Lands Staff Officer
Appeals List No. 1 / LLM

73429-60

DOCKET FILES

DESERT LAND * 4 Proof (Extension of Time)

Construction of a well with an intent to procure water for the reclamation of a desert land entry is construction of irrigation works within the contemplation of the act of February 25, 1925, and failure after diligent effort to obtain water in this manner is sufficient ground for extension of time to submit final proof as provided by this act, if there is a reasonable prospect that the entryman will be able to make final proof of reclamation, irrigation and cultivation required by law if allowed additional time.

Frederick Michael Zriny, Los Angeles 064005 (June 23, 1960)

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JUL 5 1960
DEPT. OF THE INTERIOR
BUR. OF LAND MGT.
STATE OFFICE
SACRAMENTO
CALIF.

In reply refer to:

Los Angeles 064005
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 23, 1960

DECISION

Frederick Michael Zriny	:	Desert Land
	:	
	:	

Case Remanded

Mr. Frederick Michael Zriny has appealed from that part of the Manager's decision dated February 12, 1960, rejecting his application under the act of February 25, 1925 (43 U.S.C., 1958 ed., 336) for an extension of three years' time within which to submit final proof of the reclamation of his desert land entry in the upper limits of the Coachella Valley, California.

Pursuant to a departmental decision (Frederick M. Zriny, A-25449 (February 28, 1949)), the appellant was allowed entry for the 320 acres of land on September 12, 1950. On November 21, 1955 the Land Office Manager rendered his decision under the act of March 28, 1908 (43 U.S.C., 1958 ed., 333) extending the time within which the entryman must submit final proof until September 12, 1957. On March 12, 1958 the Manager rendered a decision under the act of April 30, 1912 (43 U.S.C., 1958 ed., 334) further extending the time within Mr. Zriny must submit final proof until September 11, 1959. The appellant has not submitted final proof, but on September 10, 1959 he filed his application under the 1925 act, supra, seeking a three year extension of time within which to submit final proof. Mr. Zriny had been allowed the two previous extensions by showing that his failure to develop a producing well as a source of irrigation water for the entry was caused by such misadventures as tools and other objects falling into the well hole during the drilling process, a well hole caving in, and his latest well hole on the entry becoming filled with sand so as to damage any pump used thereon.

The appellant's present application shows that he failed to clean the well during the last extension of time because attempts by three different contractors were unsuccessful. However, Mr. Zriny asserts the well can be placed in a useful condition by cleaning it with compressed air after sufficient water is piped to the well to fill it during the cleaning process. Further, the appellant has recently completed drilling a well on a five acre tract of private land located within one half mile from his desert land entry and he reports this well is producing sufficient water with which to clean the sand clogged well on the entry.

Construction of a well with an intent to procure water for the reclamation of a desert land entry is construction of irrigation works within the contemplation of the act of February 25, 1925, supra, and failure after diligent effort to obtain water in this manner is sufficient ground for extension of time to submit final proof as provided by this act, if there is a reasonable prospect that the entryman will be able to make final proof of reclamation, irrigation and cultivation required by law if allowed additional time. James Edwin Witt, Los Angeles 088532 (March 9, 1960). In light of the effort and considerable expenditure of Mr. Zriny to develop an adequate well, and his showing that there is a reasonable prospect that he will be able to make final proof as required by law if he is allowed additional time, and considering the time which has expired while this application was being processed, the appellant is allowed an extension of three years' time within which to submit final proof. Under the provisions of the act of February 25, 1925, supra, final proof will, therefore, be required on or before September 11, 1962.

Accordingly, the Manager's decision is reversed and the case is remanded to the Manager, through the Bureau's Assistant to the State Supervisor at Los Angeles, California, for further appropriate processing in accordance with this decision.

Acting Director

DISTRIBUTION:
Hon. D. S. Saund, House of Representative (Regular Mail)
Mr. Frederick Michael Zriny (Regular Mail)
Lands Staff Officer
Appeals List No. 1
JHO'D

DESERT LAND * 1 Generally
* 2 Application

ADJUDICATION * 1 Generally

It is proper to reverse the Manager's decision and to remand the record for further consideration where it appears the Manager's action rejecting a desert land application on the basis that the lands applied for are withdrawn from such entry, was in error and that the lands are not in fact so withdrawn.

John Walter Fleming, Los Angeles 0165889 (July 21, 1960)

LO

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0165889
5.04g

July 21, 1960

DECISION

John Walter Fleming : Desert Land

Decision Reversed; Case Remanded

Mr. John Walter Fleming has appealed from a decision dated October 23, 1959, of the Manager, which rejected his above-identified application for desert land entry for the reason that the lands applied for are withdrawn from entry by first form reclamation withdrawal of October 19, 1920, under the Reclamation Act of June 17, 1902 (32 Stat. 388).

The appellant contends that the land is not subject to the withdrawal order of October 19, 1920. He states that the lands lie within the boundaries of the Imperial Irrigation District and they are therefore subject to the Smith Act of August 11, 1916 (39 Stat. 506, 43 U.S.C., 1958 ed., 621-630), and that pursuant to said act, the aforementioned district filed application and maps with the Secretary of the Interior, which were approved on February 26, 1921, and consequently that the lands are subject to entry.

Under the ruling by the Department in the case of *Bill Fults*, 61 I.D. 437 (1954), and in the decision of the Director of the Bureau of Land Management in the case of *Elizabeth Holmes MacDonald*, Los Angeles 0137690 (April 24, 1958), this contention was sustained. Accordingly, the Manager's decision was in error, and it is hereby reversed.

Accordingly, the record is being remanded to the Manager, through the Bureau's State Supervisor, Sacramento, California, for further appropriate consideration.

For the Director:

A. H.

DISTRIBUTION:

Mr. John Walter Fleming (Regular Mail)
Lands Staff Officer
Appeals List No. 1
JJS
76861-60

DOCKET FILES

DESERT LAND * 1 Generally

ADJUDICATION * 1 Generally (Priority of Consideration)

Where two or more different kinds of applications are filed for the same land, action should be taken on all the applications simultaneously, holding one for allowance and rejecting the others.

Mrs. L. Margaret McIlroy, Nevada 051684 (July 21, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Nevada 051684
5.04g

July 21, 1960

DECISION

Mrs. L. Margaret McIlroy : Desert Land

Case Remanded

Mrs. L. Margaret McIlroy has appealed from the decision of the Manager, Reno Land Office, dated March 1, 1960, rejecting her desert land application filed on March 10, 1959, on the ground that the subject lands have been classified to be more suitable for exploration under the Pittman Act.

The record shows that prior to the appellant's application, a Pittman Act application was filed by Nick Yrazabal on January 19, 1959, and serialized as Nevada 050823. The case file does not show that any final action was taken on the Yrazabal application.

Proper procedure requires that where two or more applications of different kinds are filed for the same lands, both must be considered together, and, based upon the proper classification of the land one is to be rejected and the other is to be simultaneously held for allowance, if consonant with the classification. Cf. Rhinelander Paper Company, BLM 039764 (Wisc.) (November 3, 1958); Bennett and Alice Smith, Nevada 047351 (December 8, 1958).

Accordingly, the decision of the Manager is vacated and the case is remanded to the Manager through the Bureau's State Supervisor at Reno. Action on the desert land application will be suspended until the conflicting Pittman Act application is held for allowance or rejected.

When final action is taken on this and the Yrazabal case, consideration will be given to the accuracy of the allegation in the appellant's application that the subject lands contain an adequate supply of underground artesian water.

For the Director:

DISTRIBUTION:

Mrs. L. Margaret McIlroy (Regular Mail)
Lands Staff Officer
Appeals List No. 1
MHS

76861-60

appeal to Sec
affirmed A 18640 1-27-61

DOCKET FILES

DL

RULES OF PRACTICE * 11 Statement of Reasons

An appeal will be dismissed where the statement of reasons was not included with the notice of appeal and is not filed in the office of the Director within the 30 days allowed by the regulations. Filing this document in the land office is not transmittal to the Director. Robert F. Eddy, Los Angeles 0141931 (August 1, 1960)

LO

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0141931
5.04g

August 1, 1960

Certified Mail
Return Receipt Requested

DECISION

Robert F. Eddy	:	Desert Land Application

Appeal Dismissed

Mr. Robert F. Eddy has appealed from a decision of the Los Angeles, California, Land Office, which rejected his desert land application for the reason that he did not meet the minimum requirements of the regulations for evidence demonstrating the feasibility of reclaiming the land under application for profitable irrigated agriculture.

An examination of the record discloses that Mr. Eddy's appeal is procedurally defective and that it must, therefore, be summarily dismissed.

Pertinent regulations provide:

> "If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed in the office of the Director * * * within 30 days after the notice of appeal was filed. Failure to file the statement of reasons within the time required will subject the appeal to summary dismissal * * * ." 43 CFR 1959 Supp., 221.3 (Underscoring added.)

> " * * * delay in filing will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR 1959 Supp., 221.92(b). (Underscoring added.)

In this case, Mr. Eddy's notice of appeal, filed June 29, 1959, did not include a statement of reasons. Subsequently, on the last day of the appeal period, July 29, 1959, Mr. Eddy filed this statement, not in the office of the Director, but in the Los Angeles Land Office. The statement was then forwarded to the Director by the Assistant State Supervisor August 4, 1959, several days after the 30-day period allowed for filing this document had expired. The statement was received in the office of the Director on August 10, 1959.

In these circumstances the statement of reasons was not timely filed. In a similar fact situation the Department held that an appeal would be dismissed although it was filed in a land office prior to the expiration of the appeal period and received in the office of the Director within the 10-day "grace period" if it was not actually transmitted to the Director within the 30 days allotted by the regulations. Malcolm C. Petrie, A-28229 (May 25, 1960). In the Petrie case the Department stated:

> "When, in this case, Petrie erroneously and in disregard of the very specific language of section 221.3 of the rules of practice, filed his statement of reasons in the land office, it could hardly be said that he had 'transmitted' his statement to the Director's office. That the State Supervisor, as a matter of grace, forwarded the statement can be construed only as an act of favor for Petrie. Certainly there was no obligation on the State Supervisor to do so. At the most, he could only be characterized as Petrie's agent in forwarding the statement."

Therefore, since Mr. Eddy's statement of reasons was not transmitted to the Director within the time allowed for filing this document, his appeal is dismissed pursuant to the provisions of 43 CFR, 1959 Supp., 221.98.

Mr. Eddy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

RJMcCormick

Enclosure

DISTRIBUTION:

Mr. Robert F. Eddy (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LLM

78710-60

appeal to Sec.
affirmed A-28649
9-27-61

DOCKET FILES

DESERT LAND * 4 Proof (Final)
* 1 Generally (When Included in a Reclamation Project)

RULES OF PRACTICE * 7 Private Contests

Where a desert land entry, made in 1917, was subsequently included in a reclamation project and extensions of time in which to file final proof were granted under 43 U.S.C. 333, 334 and 336, and the project has been completed, the entryman, his heirs or assigns, will be allowed 90 days in which to submit final proof or suffer cancellation of the entry. 43 CFR 232.34.

Where a private contest is initiated to invalidate a desert land entry and establish a preference right of entry thereto in the contestant HELD: The contest will be dismissed where the reason alleged for cancellation is disclosed by the records of the Bureau of Land Management. 43 CFR 221.51.

Randolph Ritchey v. Estate of May E. Patton et al., Contest No. 6801
(Los Angeles) Los Angeles 039478 August 8, 1960)

In reply refer to:

Contest No. 6801
(Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 8, 1960

Certified Mail
Return Receipt Requested

DECISION

Randolph Ritchey,
Contestant-Protestant

v.

Mary E. Kindy
Clifton O. Myll

Involving the Desert Land Entry
of May E. Patton (deceased)
Los Angeles 039478

Decision Affirmed
Final Proof Required

Randolph Ritchey initiated contest against the desert land entry of May E. Patton, deceased, charging that final proof has not been made within the time permitted by law; he asserted a preference right of entry under the act of March 3, 1891 (43 U.S.C. sec. 329). He has appealed from a Land Office decision of July 20, 1959, dismissing his complaint on procedural grounds.

Mary E. Kindy and Clifton O. Myll, each claiming as assignee of the heirs of May E. Patton filed for approval documents purporting to be assignments to the whole of the entry. In the same decision of July 20, it was held that Clifton O. Myll was entitled to recognition as the assignee of the entry. Mrs. Kindy has appealed from the refusal to recognize her assignment.

Desert land entry 039478 embracing the NW¼SW¼, SW¼NW¼ sec. 12, T. 5 S., R. 7 E., S.B.M., California, was allowed to May E. Patton on June 2, 1917. First, second and third year proofs were duly filed under the desert land laws. Extensions of time to June 2, 1930, in which to submit final proof were granted the entrywoman. 1/ In the meantime "The tract was included within First Form Withdrawal on October 19, 1920, and for that reason an application for extension of time is unnecessary and it is recommended no further action be taken." 2/ Mrs. Patton, the entrywoman, died in 1929.

The entrywoman, her heirs or assigns, were duly informed, as required by law, of the availability of water for the entry. 3/ Final proof for the entry has not been submitted by her heirs or assigns. Mr. Myll and Mrs. Kindy each allege present ownership of the entry by reason of separate assignments of interests of parties who are shown to have been entitled to share in the entry from or through the estate of the entrywoman.

Exclusive of the reasons set forth in the decision below, the Ritchey complaint must be dismissed because a person seeking a preference right of entry is restricted to "initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management" 43 CFR 221.51. 4/ Clearly, the fact that final proof has not yet been submitted is shown by the records of the Bureau.

Furthermore, we see no reason to depart from the long established rule that absence under leave improvidently granted by the local officers on an insufficient showing apparent upon the record of the Land Department, but without fraud or misrepresentation on the part of the entryman, cannot afford a basis for contest. See Coyle v. Drake, 47 L.D. 148 (1919). Thus, even if the extensions were improperly granted, the fact remains that extension of time was granted by the local officers and neither contest nor protest may be favorably entertained by reason of failure to furnish final proof. In this regard we note that the extension was properly granted under the rule in Maggie L. Havens, A-5580 (October 11, 1923) 5/ and there is no authority in the Director to change or modify the rule so enunciated by the Department.

For the reasons outlined above, the decision appealed from, insofar as it dismissed Ritchey's contest is affirmed.

1/ Under the act of March 28, 1908, April 30, 1912, and February 25, 1925 (43 U.S.C. secs. 333, 334 and 336, respectively).
2/ Letter from Examiner, GLO, dated December 7, 1928, to Commissioner, GLO. The reclamation withdrawal was for the Yuma Irrigation Project and was made under the act of June 17, 1902, 43 U.S.C. secs. 416, 419.
3/ Public Notice No. 1 of the Bureau of Reclamation, dated April 19, 1954, and titled -

Boulder Canyon Project, California
All-American Canal System
Coachella Division

(Footnote 3 continued
on page 3)

Myll and Kindy have each submitted for approval assignments purporting to be assignments covering the whole of the desert land entry. The evidence submitted is outlined in the land office decision. Based on such evidence, and giving full faith and credit to prior court determinations in estate proceedings it was found that Myll had established that he is the owner of the entry and entitled to recognition as the assignee.

The record has been carefully reviewed. The evidence fully supports the findings that Myll is the assignee of the entry and entitled to recognition as such. The evidence, discussed in full in the decision appealed from, shows that Kindy is not the owner of the entry and that her assignment must be rejected. The further evidence submitted on appeal supports the findings below.

Therefore, the Land Office decision, insofar as it held that the Myll assignment must be recognized and approved and the Kindy assignment must be rejected, is affirmed.

Mr. Ritchey and Mrs. Kindy are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

(Footnote 3 continued from page 2)

Public Notice Announcing Availability of Water for Public Lands and
Certain Desert Land and Homestead Entries and
Opening of Public Lands to Entry

The lands in this entry were designated Farm Unit No. 1E.

4/ Underscoring added. This rule is identical in content with Rule 1 of the Rules of Practice, effective February 1, 1911 (51 L.D. 547). The Rule 1 provided, in pertinent part, that - "Contests may be initiated by any person seeking to acquire title to, or claiming an interest in, the land involved, against a party to any entry * * * relating to the public lands, because of priority of claim, or for any sufficient cause affecting the legality or validity of the claim, not shown by the records of the Land Department." (Emphasis added.)

5/ Also see Hazel, Assignee of Patterson, 53 L.D. 644 (1932).

In the event of an appeal by Mr. Ritchey, the adverse parties are to be served through their attorneys -

Mr. Gordon Cologne
45-596 Jackson Ave.
P. O. Box 96
Indio, California

and

Messrs. Carroll & Anderson
45-561 Oasis Street
Indio, California

In the event of an appeal by Mrs. Kindy, the adverse parties are to be served through their attorneys -

Mr. William Camil
4055 Wilshire Blvd.
Los Angeles 5, Calif.

and

Messrs. Carroll & Anderson
45-561 Oasis Street
Indio, California

The desert land law, 43 U.S.C. sec. 448, provides in pertinent part that where a "project is carried to completion so as to make available a water supply for the land embraced in any such desert land entry, the entryman shall * * * be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said law." And where final proof is not made within the prescribed time, then the claimant will be allowed 90 days in which to submit final proof; should no action be taken to submit final proof within the time allowed the entry will be cancelled. 43 CFR 232.34(a) and (b).

Therefore, the reclamation project having been completed and water being available to this entry (see footnote 3 supra) Myll is allowed 90 days from the receipt of this decision in which to submit final proof for desert land entry Los Angeles 039478 to the Manager, Land Office, Los Angeles, California, failing in which the entry will be cancelled without further notice to him.

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Hon. D. S. Saund, Member of Congress
Mr. Gordon Cologne, Attorney for Mrs. Kindy (Certified Mail)
Mr. William Camil, Attorney for Mr. Ritchey (Certified Mail)
Carroll & Anderson, Attorneys for Mr. Myll (Certified Mail)
Mr. C. F. Patton (Regular Mail)
Mr. Clifton O. Myll (Regular Mail)
Mr. Randolph Ritchey (Regular Mail)
Bureau of Reclamation, Region 3, Boulder City, Nevada
Lands Staff Officer (1)
Appeals List No. 1
BF

78968-60

appeal to Sec.
affirmed as modified A-28673
2-7-62

DOCKET FILES

50

DESERT LAND * 1 Generally (alienation)

ADJUDICATION * 2 Construction of Regulations

A desert land entryman who, prior to the submission of final proof, executes a contract, to convey the land after a patent is issued, defeats his rights to such patent and the entry will be cancelled.

La Dean Butler et al., Los Angeles 099831 etc. (September 2, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 099831
099833
5.04g

September 2, 1960

Certified Mail
Return Receipt Requested

DECISION

Miss La Dean Butler :
Mrs. Ellen R. Butler :

Desert Land

Decision Affirmed

Miss La Dean Butler and Mrs. Ellen R. Butler have appealed from the decision of the Chief, Land Adjudication Unit, Los Angeles Land Office, dated December 16, 1959, which rejected their applications for extension of time within which to submit final proofs and cancelled their desert land entries because they had entered into executory contracts to convey land in their entries prior to the submission of final proofs.

The record shows that Miss Butler's entry, Los Angeles 099831, was allowed on July 7, 1954, and Mrs. Butler's entry, Los Angeles 099833, was allowed on April 22, 1955. On or about September 1, 1956, the appellants and one Albert Watson entered into an agreement whereby the latter was to do all the work to meet the requirements of the government and in payment therefor he was to receive a deed to one-half of the land that was under irrigation after patents for the lands were issued. Watson accordingly did the clearing, leveling, and road building at a cost of $1,925.00, but he thereafter suffered financial reverses that prevented him from proceeding with his agreement so he withdrew and the appellants entered into a written contract with A. Y. Satterfield on January 6, 1958. The contract provided that Satterfield would advance the necessary money to install a well and pumping equipment sufficient to irrigate the land and qualify the entries for patents and in return he was to receive an undivided one-half interest in the land after patents were obtained. The contract also provided that in the event Satterfield drilled a well and did not find sufficient water to irrigate the land, then the contract would be null and void. Satterfield thereafter spent $1,243.90 for a geophysical water report and approximately $7,000.00 for drilling, casing, and testing the wells.

In their statements of reasons the appellants admit that "the law is very clear that a contract to convey made prior to issuance of patent, * * * /is/ contrary to the laws respecting desert land entries" but they allege that the terms of the agreement constituted a mortgage and not a conveyance. The appellants cite several California court cases in support of their allegation, but those cases hold that a mortgage is security for a debt and that it is not a grant of an estate in real property. The appellants have cited no facts that establish their allegation that the agreements with Watson and Satterfield created a debtor and creditor relationship only.

The facts in this case are irrefutable that prior to the submission of final proofs the appellants made contracts to convey parts of the entered lands after the issuance of patents.

The Department has held that:

> " * * * The clear intent of the desert land law forbids recognition of contracts to convey after patent * * * irrespective of the time the contract was made and regardless of whether or not the original entry was made honestly and in good faith." Herbert C. Oakley 34 L.D. 383 (1906).

The execution of such contract prior to the submission of final proof defeats the right to a patent. Swaze v. Suprenant 24 L.D. 337 (1897).

Moreover, the conditions that were incorporated in the contracts were not such that they could be construed as assignments because assignments imply a transfer of a property interest whereas in these cases no transfer was made and none was contemplated until after the patents, if any, were granted.

Accordingly, the decision cancelling the entries of the appellants is affirmed.

In view of the foregoing, it is not necessary to consider the propriety of that part of the decision which rejected the appellants' applications for extension.

Miss La Dean Butler and Mrs. Ellen R. Butler are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each case included in the appeal. If the appeal covers all adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

Earl J Thomas

Acting Director

Enclosures

DISTRIBUTION:

Clyde C. Downing, George R. Maury, Attorneys for Appellants (Certified Mail)
Miss La Dean Butler (Regular Mail)
Mrs. Ellen R. Butler (Regular Mail)
Lands Staff Officer
Appeals List No. 1
MHS

80313-60

DOCKET FILES

DESERT LAND * 2 Application
* 3 Classification
* 5 Water Right

A desert land application for land in Mesquite Valley, California, will be rejected where the applicant intends to rely on underground water for the irrigation of the land and the record shows that the maximum annual rate of recharge to the ground water table is insufficient to meet the demands for privately held lands already under cultivation.

Marian Lee Overholser, Los Angeles 0165113 (December 14, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Los Angeles 0165113

December 14, 1960

Certified Mail
Return Receipt Requested

DECISION

Marian Lee Overholser : Desert Land Application

Decision Affirmed

Mrs. Marian Lee Overholser has appealed from a decision of the Chief, Lands Adjudication Unit, dated April 27, 1960, rejecting her desert land application because she has failed to submit sufficient evidence demonstrating that the land applied for 1/ was capable of being developed into a profitable farm and because the applied for tract is located in Mesquite Valley, California, where the recharge to the underground water table is insufficient to meet the demands for land already being irrigated.

On appeal Mrs. Overholser, who intended to utilize underground water for the irrigation of the applied for land, states generally that the land is suitable for farming and that wells on nearby lands are producing sufficient water for irrigation purposes. Nevertheless, the record shows that the land is in fact located in Mesquite Valley where the annual rate of recharge to the underlying ground water table is insufficient to meet the demands for privately held lands already under cultivation. In view of this fact, the Department has refused to allow additional desert land entries in the Mesquite drainage basin since the applicants "cannot show that they have a right to appropriate water for the irrigation of the lands, a prerequisite to the allowance of desert land entries." Ruby D. Moore et al., 64 I.D. 137 (1957); Cf Oscar O. H. Nelson et al., Los Angeles 0160613, etc., (September 17, 1959. Approved by the Assistant Secretary of the Interior September 25, 1959).

Accordingly, irrespective of the other issues which may have been raised by the decision of the Chief, Lands Adjudication Unit, and the applicant's appeal from that decision, the application must be rejected and the decision appealed from is affirmed.

Mrs. Overholser is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended.

1/The S½ sec. 28, T. 20 N., R. 12 E., S.B.M., California.

See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director

G. H. Brown

Enclosure

DISTRIBUTION:
Mrs. Marian Lee Overholser (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LIM

appeal to Sec
affirmed A-28773 6-27-62

DOCKET FILES

DESERT LAND * 2 Application

* 3 Classification

A desert land application must be rejected where the land has been classified as unsuitable for agricultural entry under the public land laws due to the unavailability of sufficient water for irrigation purposes.

Floyd W. Thomas, Los Angeles 0140285 (December 21, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0140285
5.04g

December 21, 1960

Certified Mail
Return Receipt Requested

DECISION

Floyd W. Thomas : Desert Land Application

Decision Affirmed as Modified

Mr. Floyd W. Thomas has appealed from a decision of the Chief, Land Adjudication Unit, Los Angeles, California, Land Office, dated March 22, 1960, holding his desert land application for the NW¼NW¼ sec. 30, T. 14 N., R. 9 E., SBM, for rejection and requiring him to submit within 30 days from the receipt of the decision additional evidence of the feasibility of reclaiming the applied for land.

The record shows that in the decision Francis Elizabeth Cain et al., Nick P. Leko et al., Los Angeles 0145092 etc., 0141065 etc., dated March 11, 1960, and approved by the Assistant Secretary of the Interior on March 21, 1960, all of the public land in T. 14 N., R. 9 E., S.B.M., was classified as unsuitable for agricultural entry under the public land laws due to the unavailability of sufficient water for irrigation purposes. Notice of this classification was published in the Federal Register on April 22, 1960. See 25 F.R. 3532. For this reason, the Chief, Land Adjudication Unit, erred in allowing the appellant additional time to perfect his application and the application must be rejected.

Accordingly, the decision appealed from is affirmed insofar as it rejects the appellant's application.

Mr. Thomas is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:
John B. Piccolo

Enclosure

DISTRIBUTION:
Mr. Floyd W. Thomas (Certified Mail)
Lands Staff Officer
Appeals List No. 1
LLM

85644-60

DOCKET FILES

DESERT LAND * 3 Classification

It is proper to reject a desert land application where the land applied for has been determined to be unsuitable for desert land entry because use of the subsurface would be dangerous due to contamination by unexploded ordance, and because there is no available water for the irrigation of the land.

Herman Engber Los Angeles 0167392 (December 30, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0167392
5.04g
December 30, 1960
CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Herman Engber : Desert Land Application

Decision Affirmed

Mr. Herman Engber has appealed from a decision of the Chief, Lands Adjudication Unit, Los Angeles Land Office, dated May 23, 1960, rejecting his above-identified application filed under the Desert Land Act, as amended (43 U.S.C. 1958 ed., sec. 321 *et seq.*), for certain lands in Riverside County, California.

The application was rejected for the reason that the lands applied for were used by the United States Army for a maneuvering area during World War II, which became contaminated by unexploded mines, bombs, shells, and other missiles, and though the area has been cleared of explosives by visual inspection there is the possibility that unexploded objects still remain in the lands thus constituting a hazard to life and property. The application was rejected for the additional reason that the lands sought are located in area known as Chuckawalla Valley where it has been determined that there is insufficient groundwater supplies for irrigation of the lands and all of the available ground water within the drainage involved is already committed to use.

The Corps of Engineers, Department of the Army, has advised against any subsurface use of the lands until such time as they are completely decontaminated, and there are no plans for decontaminating the lands in the foreseeable future.

The appellant contends in substance that he will assume all risk of hazard to life and property because of the contaminated condition of the lands, and will relieve and absolve the United States, including the Department of Interior, any Military or other Department or Bureau of the United States Government, if his application is allowed. The appellant states that he will also proceed at his own cost and risk to detect, locate, and remove, and report, if any, all explosive materials prior to the cultivation of the land. He also asserts that he is familiar with the ground water supply as it exists in the area, and that in his opinion the Bureau's determination that the water supply is insufficient to irrigate additional lands is erroneous. The appellant contends that further exploration is necessary to arrive at a correct conclusion as to the actual conditions. He proposes to explore for such water, which he believes to exist in water tables and water courses in depths beyond the presently known tables or stratum.

Although the appellant is willing to assume the risk of hazards that may still be prevalent in the lands applied for by him, it has been determined in similar cases that it is proper to reject desert land applications for lands that are determined to be unsuitable for desert land entry because they are dangerous for subsurface use due to contamination by unexploded ordnance. Georgia R. Williams et al., A-28149 (January 15, 1960).

Moreover, the lands are located in an area which has been the subject of numerous investigations conducted by the Bureau concerning the occurrence of ground water, and it has been determined in a number of cases that the water table is insufficient to permit substantial agricultural developments, and that all of the ground water within the drainage is already committed to use. Frances Elizabeth Cain et al., Los Angeles 0145092, etc., (June 18, 1959) 1/; Oscar O. H. Nelson et al., Los Angeles 0160613, etc., (September 17, 1959) 2/; Florence Irene Montalbano et al., Los Angeles 0158167 (October 19, 1959) 3/. The appellant has not submitted any convincing showing that there is a supply of water available for irrigation. However, irrespective of the sufficiency of any showing made, the lands cannot properly be classified as suitable for desert land entry because there is no water available for irrigation, and the appellant's application was subject to rejection on this basis alone. Cf. Ruby R. Huffman et al., 64 I.D. 57 (1957); Walter E. Scott, A-27293 (June 21, 1956).

Accordingly, the rejection of the appellant's application was proper, and the decision appealed from is affirmed.

Mr. Herman Engber is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

For the Director:

John B. Piccolo

Enclosure

DISTRIBUTION:
Mr. Herman Engber (Certified Mail)
Lands Staff Officer
Appeals List No. 1
RBO

1/ Approved by Assistant Secretary of the Interior, June 24, 1959.
2/ Approved by Assistant Secretary of the Interior, September 25, 1959.
3/ Approved by Assistant Secretary of the Interior, January 14, 1960.

DOCKET FILES

DESERT LAND * 2 Application

Where no issue is presented by appeals from decisions calling upon desert land applicants for additional showings in connection with their desert land applications, and the appellants submit the showings with their appeals, the cases will be remanded for further consideration.

Ralph Kenneth Kisling, Edgalee Ann Kisling, Los Angeles 0165241, 0165242 (January 4, 1961)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0165241
0165242
5.04g

DECISION

January 4, 1961

Ralph Kenneth Kisling	:	
Edgalee Ann Kisling	:	Desert Land

Cases Remanded

Mr. Ralph Kenneth Kisling and Mrs. Edgalee Ann Kisling have appealed from separate decisions of the Manager dated July 8, 1960, rejecting their applications under the Desert Land Act (43 U.S.C., 1958 ed., secs. 321 *et seq.*), for the reason that the applications were deficient with respect to showings required by the Departmental regulations (43 CFR, Part 232). Specific reference was made to lack of evidence showing the availability and sufficiency of water, the agricultural character of the lands applied for and the practicability of the plans for the development of the lands. An attached "Appendix A" stated the type of information that would be sufficient to meet the requirements.

Both appellants have submitted considerable data to this office following the filing of the notices of appeals. It appears that appellants are attempting to complete their applications rather than to point out wherein they believe the decision was in error. In the circumstances, since no issue has been presented for a decision by this office, the cases are being remanded to the Los Angeles Land Office, through the Bureau's Assistant to the State Supervisor for California, for further consideration. See in this connection Departmental decision A-28427, *Newton J. Jackson* (August 30, 1960).

For the Director:
John B. Piccolo

DISTRIBUTION:
Mr. Ralph Kenneth Kisling (Regular Mail)
Mrs. Edgalee Ann Kisling (Regular Mail)
Lands Staff Officer
Appeals List No. 1
JB

appeal to Sec
affirmed A-28839
9-7-62

DOCKET FILES

DESERT LAND * 3 Classification

A desert land application is properly rejected where there is no evidence that water is available for the irrigation of additional lands or where all of the water supplies within the drainage area are already being put to beneficial use in conjunction with other lands in the drainage area involved.

A desert land application is properly rejected where there is no evidence of a water supply available of a quality or quantity required for the irrigation of the land and the depth to water exceeds the depth from which it is feasible to pump irrigate from wells in the area.

Desert land applications for lands having unfit soils, rough topography, or other characteristics which make the lands unfit for irrigated crop production are properly rejected.

A hearing is not held as a matter of right to determine the proper classification of land for desert land entry.

Adolph S. Erickson et al., Los Angeles 0154243, etc. (January 31, 1961)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
FEB 16 3 52 PM 1961
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Los Angeles 0154243 1/
0127712 etc. 2/
0159640 etc. 3/
0158797 etc. 4/
0161779 etc. 5/
0146715 etc. 6/
0160463 etc. 7/
0157865 etc. 8/
0160498 9/
0162618 etc. 10/
0151500 etc. 11/
0146929 etc. 12/
0143364 etc. 13/
0160918 etc. 14/
Sacramento 057251 etc. 15/
5.04g

DECISION

January 31, 1961

Adolph S. Erickson 1/ :
Minnie Janet Weeks et al. 2/ :
Julius D. Hohensee et al. 3/ :
Myrtle L. Burdick et al. 4/ :
James Lee Coleman et al. 5/ :
Lawrence C. Wall, Jr. et al. 6/ :
Jack Fogel et al. 7/ :
Thomas H. Robinson et al. 8/ : Desert Land Applications
Robert James Worcester 9/ :
Mary I. Dick et al. 10/ :
John A. Perrell et al. 11/ :
Lola B. Lovett et al. 12/ :
Louis Mattis et al. 13/ :
Kasuko Ige,et al. 14/ :
Phyllis A. Hook et al. 15/ :

Decisions of the Manager and Chief, Land Adjudication Unit, Affirmed

Adolph S. Erickson and the others listed on Appendices "A" through "O" attached, have appealed from decisions of the Manager and

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1/ For names of applicants and corresponding Land Office serial numbers see Appendix "A".

2/ For names and serial numbers see Appendix "B"

3/ For names and serial numbers see Appendix "C"

4/ For names and serial numbers see Appendix "D"

5/ For names and serial numbers see Appendix "E"

6/ For names and serial numbers see Appendix "F"

7/ For names and serial numbers see Appendix "G"

8/ For names and serial numbers see Appendix "H"

9/ For names and serial numbers see Appendix "I"

10/ For names and serial numbers see Appendix "J"

(Footnotes 11, 12, 13, 14 and 15 continued on page 2)

of the Chief, Lands Adjudication Unit which rejected their desert land applications for the stated reasons that the applications were not accompanied by proper showings as contemplated by the regulations 43 CFR, 1954 ed., Part 232. Certain of the applications were rejected for the additional reasons that there is no water available for the irrigation of the land, the lands are contaminated with unexploded missiles, and there are other factors which render the lands unfit for disposal under the Desert Land Act.

The Departmental regulation 43 CFR, 1954 ed., Part 232.10, provides that a desert land applicant must state that he is personally acquainted with the land and furnish certain other information as outlined in the application Form 4-274. The regulation 43 CFR, 1954 ed., 232.14 also provides that at the time of filing the application with the Manager, the applicant must submit a map of the proposed irrigation development and a summary statement of facts demonstrating that an adequate irrigation water supply is available for the irrigation of the land and that the land is of a character suitable for irrigated crop production. See Richard G. Peeples, 48 L.D. 554 (1922). He must also submit a plan of the proposed irrigation development completed in sufficient detail to reasonably demonstrate that reclamation of the land is feasible by some practical means. Martha K. Bongfeldt et al., Los Angeles 0150912 etc., approved September 25, 1959. In the absence of plausible evidence that the lands are susceptible of reclamation by some practical means desert land applications must necessarily be rejected. Roy N. Brown, A-25935 (November 16, 1950). Also see June C. Keane, A-27847 (February 17, 1959).

The circumstances involved in the applications here under consideration are enumerated in Appendices "A" through "O" below.

Appendix "A"

The agricultural potential of the lands in Ames Valley has been the subject of intensive investigations by field personnel of this Bureau. Hydrological engineers of the U. S. Geological Survey have advised personnel of this Bureau that the rate of recharge to the ground water table in the valley is very slow due to the low annual precipitation and the limited nature of the water shed. In the circumstances it appears that extensive pumping would lead to the total depletion

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11/ For names and serial numbers see Appendix "K"
12/ For names and serial numbers see Appendix "L"
13/ For names and serial numbers see Appendix "M"
14/ For names and serial numbers see Appendix "N"
15/ For names and serial numbers see Appendix "O"

of the ground water in the Valley. See Victor Edwin Renaud, A-25595 (February 14, 1949). The Department stated in the case of Lucy Gay Alvord et al., A-26531 (February 11, 1953) that although water has been discovered in a few unauthorized wells, the Department sees no reason to change its previous classification based on geological studies indicating that any ground water in the valley is limited and would soon be exhausted by pumping for irrigation. Also see Lewis F. Mullen et al., A-26513 etc. (January 30, 1953).

Moreover, the record reveals there are several thousand acres of deeded privately-owned lands in the immediate vicinity of the lands here involved. However, none of these lands have been developed for agricultural purposes. The appellant has submitted no persuasive showing that water is available or that the lands are susceptible of development by any practical means.

Appendix "B"

The lands are located in the Mojave River Drainage. Geological and hydrological studies of the entire drainage area reveal that all available water in the drainage is now being put to beneficial use for irrigation as well as for industrial, municipal, military, and other public purposes. See Peter W. Breene et al., Los Angeles 0148894 etc. approved September 25, 1959, and cases cited.

Appendix "C"

The lands are located in Central Valley Basin, Kern County, California, On the basis of information concerning existing wells in the area, the depth to ground water is 500 feet or more which exceeds the depth from which it is considered practically feasible to pump irrigate for the production of crops in the area. See Elizabeth Bullard et al., A-27242 (December 28, 1955). The applicants have submitted no showings with their applications or their appeals that reasonably demonstrate that water is available for the irrigation of the land or that the development of the land is feasible by any practical means.

Appendix "D"

The lands are located in Pahrump Valley, California.

This Bureau has completed a detailed field investigation and analysis of the circumstances of soils, water supply and rates of water use, and other factors affecting agricultural developments within the Valley.

The record indicates that there are more than 51,000 acres of privately-owned lands within the drainage area which are irrigable if water supplies are available in addition to seven or more subsisting desert land entries embracing some 2,000 acres. Water requirements for the irrigation of the privately-owned lands together with the pending desert land entries, if developed for irrigated crop production, would exceed 260,000 acre feet per annum; whereas, the best information available indicates that the annual rate of recharge to the whole drainage area does not exceed about 23,000 acre feet. The record indicates further that all of the available water within the Valley is already being put to beneficial use on the more productive soil sites within the drainage and that the present rate of water use on lands now irrigated exceeds the long-time annual inflow to the whole drainage area. See Horace H. and Norma J. Neely, A-27890 (April 27, 1959). Also see Dottie J. Beck et al., A-27884 (March 5, 1959).

Moreover, the record reveals that the soils on the lands vary from excessively heavy clays to shallow, broken, upland soils that are unfit for irrigated crop production. See Dottie J. Beck et al., supra.

Appendix "E"

The lands are located in Ward Valley, California. Field investigation and study of the drainage area indicates that there is insufficient ground water available for the irrigation of agricultural crops on a sustained basis. This conclusion is based on studies of the geological features of the whole drainage area and records of wells in the area and is in agreement with the findings of both the California State Division of Water Resources and the United States Geological Survey concerning the area involved. Moreover, the record indicates that some 10,000 acres of adjoining or nearby lands in the drainage are privately-owned lands which have already been patented. However, none of these privately-owned lands have been developed for agricultural purposes.

There is nothing in the record to indicate that water is available in amounts required for irrigation or that the land involved is susceptible of irrigation by any practical means. See Martha K. Bongfeldt et al., supra. The showing submitted by the applicant has been fully considered in this respect. In the circumstances the desert land applications could not be properly allowed. See June C. Keane, supra.

As to the application Los Angeles 0158850 of Anthony Joseph Taravella, the application was rejected because the lands involved are contaminated with unexploded mines, bombs, shells, and other missiles. It appears evident from the record that the development of irrigation works and cultivation of the lands such as would be required to comply with the final proof requirements of the Desert Land Act would be hazardous. Therefore, we believe that the lands embraced by Mr. Taravella's application are subject to rejection for the additional reason that development as required by the Desert Land Act would be hazardous. See Hildreth M. Doyle et al., Los Angeles 0123493 etc. (April 10, 1959) involving other similar lands in Ward Valley.

Appendix "F"

The lands are located in Coachella Valley, California. The record reveals that all of the water in the Valley is already being put to beneficial use for agricultural, domestic, urban, recreational, and other purposes and that the water requirements for these established users already exceed the normal recharge to the ground water basin. In the circumstances, no further desert land applications can be properly allowed. See Peter W. Breene et al., supra.

Certain of the appellants stated that they propose to obtain water for the irrigation of the lands from the Los Palmos Water District. The appeals were accompanied by a "validation complaint" dated December 6, 1957, purportedly demonstrating that the Los Palmos Water District is organized under State law. By letter of July 16, 1959, to the Chief, Lands Adjudication Unit, Bureau of Land Management, Erwin E. Stephens, Jr., President of the Water District stated that the district proposes to deliver water to the lands in the area.

However, the appellants have furnished no information as to whether or not the water district is capable of delivering water for the irrigation of the lands. In fact, there is nothing in the record to show that the company owns any facilities for water delivery. Nor does the record show that it has any specific plans for the construction of such facilities. The pertinent departmental regulation 43 CFR, 1954 ed., 232.14 states in applicable part as follows:

> "At the time of filing the application with the Manager, the applicant also must file plans describing in detail the following: Source of water supply; character of the irrigation works constructed, in the course of construction, or proposed to be constructed, ie., reservoirs for storage, canals, flumes, or other methods by which the water is to be conserved and conveyed to the land; * * *. If the works have not been constructed, it must be shown whether they are to be built by an irrigation district, a corporation, or an association, and a

general description of the proposed plan must be furnished. It must be shown in connection with any proposed plan whether, and by whom, surveys and investigations have been made which demonstrate the existence of a sufficient water supply and the feasibility of the proposed works to convey water to the land. If the applicant individually, or in association with others, proposes to construct irrigation works, a statement must accompany the application, containing a general description of the proposed works, an estimate of the cost, and such other data as will enable the Department to determine the sufficiency of the water supply and the feasibility of the proposed works to convey water to the lands to be irrigated * * *".

Since the appellants have made no showing that an actual water supply is available for the irrigation of the lands or furnished any plans demonstrating that the lands are susceptible of development by any practical means, the applications must necessarily be rejected. See Florence Irene Montalbano, Los Angeles 0158167 etc. (October 19, 1959) approved January 14, 1960.

Appendix"G"

The lands are located in Chuckawalla Valley, California. This Valley has been the subject of numerous investigations by this Bureau concerning the occurrence of ground water in the Valley wherein it has been determined that the annual rate of recharge to the ground water table is insufficient to permit any substantial agricultural developments and that all of the ground water within the drainage is already being put to beneficial use or is committed to use in conjunction with other lands in the drainage. See Oscar O. H. Nelson et al., Los Angeles 0160613 etc., approved September 25, 1959.

The record reveals further that there are some 9,000 acres of privately-owned lands within the drainage that would be irrigable if water was available for irrigation in addition to about 18,000 acres embraced by outstanding, unperfected desert land entries.

Appendix "H"

The lands are located in Ogilby Valley, California. This is a most arid region. The annual recharge to the ground water table is very small due to the low annual precipitation in the area. In fact, studies of the geological and hydrological features of the area reveal that the prospect of recovering water in amounts required for irrigation is very remote. See Richard G. Peeples, 48 L.D. 554 Also see Max and Louise Heinegg, A-25613 (May 31, 1949). The record reveals there is no irrigation in the drainage area. See Georgia Blaine et al., Los Angeles 0153231 etc., approved September 25, 1959.

As to wells in the area, the record indicates there is an eight inch well in sec. 33, T. 13 S., R. 19 E., S.B.M., California, which is reported to produce 600 gallons of water per minute and that there is a 12-inch well in sec. 4, T. 15 S., R. 20 E., of unknown capacity. However, the standing water level in the 8 inch well is 450 feet and the water level in the 12 inch well is 400 feet. These depths exceed the depths from which it is considered feasible to pump water for irrigated crop production. See Elizabeth Bullard et al., supra. The appellants have not shown that water in amounts required for irrigation is available or that reclamation of the land is feasible by any practical means.

Appendix "I"

The lands are located in Canebrake Valley, California. Hydrological and geological studies of the features of the area reveal that the annual rate of recharge to the ground water table in the area is very small and that the prospect of obtaining water from wells in amounts required for a commercial irrigation operation on the acreage of land involved is very remote. See Max and Louise Heinegg, supra. In the circumstances, the allowance of an agricultural entry which would necessarily require extensive withdrawals of any ground water available would not be in accord with the intent of the Desert Land Act. See Lucy Gay Alvord et al., supra. The appellant has made no persuasive showing that water is available for the irrigation of the lands or that the lands are susceptible of irrigation development by any practical means. See June C. Keane, supra.

Appendix "J"

The lands are located in Rice Valley, California. The applications were rejected because the lands are contaminated with mines, bombs, shells, and other missiles which constitute a hazard to life and property. The Land Office was upheld by the Director in the rejection of desert land applications in an identical case. See Hildreth M. Doyle et al., Los Angeles 0123493 etc. (April 10, 1959). However, irrespective of the issue of the contamination field investigation and study of the drainage area indicate that there is insufficient water available for the irrigation of agricultural crops. This conclusion is based upon studies of the geological features of the entire drainage area as well as records of stock water and domestic wells and a long history of unsuccessful attempts to develop irrigation wells in Rice Valley. Moreover, our records indicate that there are some 9,000 acres of privately-owned lands in Rice Valley which would be suitable for irrigation if water was available. However, there is no record of any irrigation in Rice Valley. See Francis Elizabeth Cain et al., Los Angeles 0145092 etc., approved June 24, 1959.

Appendix "K"

The lands are located in Fremont Valley, California. The lands here involved have been the subject of an intensive investigation of the geological and hydrological factors affecting the supply and quality of ground water in this part of Fremont Valley, The report reveals that the lands in sections 25, 26, 33, T. 29 S., R. 38 E., M.D.M., California, lie outside the limits of the acquifer from which water may be obtained in amounts required for irrigation. Accordingly, the applications embracing the public lands in the foregoing sections could not be properly allowed. See Walter E. Scott, A-27293 (June 21, 1956). As to the lands in sec. 8, T. 30 S., R. 39 E., the record reveals that the ground water underlying the lands is saline in character and unfit for irrigation use. Accordingly, the lands cannot be classified as suitable for irrigation from wells. The record also indicates that adjacent, similar type lands that are privately-owned as well as public lands embraced by unperfected desert land entries have not been developed for irrigated crop production. Moreover, the record reveals that there is a relatively small amount of ground water available in Fremont Valley and that the available water can best be employed in conjunction with the agricultural development of better quality lands in the valley and for other purposes.

Appendix "L"

The lands are located on Palo Verde Mesa, California. The record shows that the lands are located outside the area of influence of the Colorado River and that water is not available in amounts required for irrigated crop production. Cf. Peter W. Breene et al., supra. Moreover, the depth to ground water exceeds the depth from which it is considered economically feasible to pump irrigate for the irrigation of crops in the area. See Martha K. Bongfeldt et al., supra.

The appellants have not submitted with their applications or their appeals any substantial evidence that an adequate water supply is available for the irrigation of the lands or that the lands are susceptible of reclamation by any practical means. Therefore, the applications were properly rejected. See June C. Keane, supra.

Appendix "M"

The lands here under application extend inland along Vidal-Calzone Valley from a point about two miles west of the Colorado River. The circumstances of water supplies available for the irrigation of the lands and other factors affecting the agricultural potential of the lands have been thoroughly investigated. The record reveals, as certain of the appellants allege, that there are irrigation wells in operation on the Damerel Ranch (Rio Mesa Ranch). However, information based on an eight year record of production from these wells reveals that the output of the four wells involved range from 100 gallons of water per minute to no more than 500 gallons per minute. The draw-down of these wells under continuous pumping ranges from one foot for every three gallons per minute pumped to one foot for each 25 gallons per minute pumped which reveals that the wells are very inefficient. In order to utilize the water from these wells for the irrigation of about 125 acres of lands on the Damerel property the owners have found it necessary to supplement the well supply by pump irrigation from the Colorado River. None of the lands here involved appear to be situated near enough to the Colorado River to obtain supplemental water for irrigation nor have the applicants indicated any intention of doing so.

As to the lands extending inland to the vicinity of Vidal and Vidal Junction, records of wells in the vicinity reveal that there is insufficient ground water available for irrigation and that the depth to ground water exceeds the depth from which it is practically feasible to pump water for irrigation. See Martha K. Bongfeldt et al., supra.

Appendix "N"

The lands are located in Fenner Valley, California. The record reveals there are twelve or more wells drilled to depths of from 400 feet at locations near the valley floor to depths of more than 1,100 feet at elevations above the valley floor. Depths to water in these wells range from 262 feet to 606 feet. Though most of the wells are large wells having casings 6 to 18 inches in diameter the highest production reported for any of the wells is 199 gallons of water per minute which would be sufficient for the irrigation of no more than 20 or 30 acres of land, whereas, the applicants have each applied for tracts of 320 acres. Moreover, the record reveals there are more than 5,000 acres of privately-owned lands in the township which either adjoin the lands here involved or lie immediately adjacent thereto. However, there is no record that any of these lands have been developed for agricultural purposes.

The appellants submitted no plausible showings either with their applications or their appeals that water is available in amounts required for the irrigation of the lands or that the lands are susceptible of development for irrigation purposes by any practical means. See June C. Keane, supra.

Appendix "O"

The lands are located on the Madeline Plains of Lassen County, California. Field investigation of the lands reveals that the soils on the lands vary from poorly drained alkali impregnated flats to light, shallow, rocky upland soils none of which is susceptible of reclamation for irrigated crop production by any practical means. Such lands cannot be properly classified as suitable for desert land entry. See Ruby D. Moore et al., 64 I.D. 137 (1957). The record indicates further that the cost of reclaiming and developing the land is not feasible in view of the short growing season in the area and the marginal character of the soils for agricultural purposes. See Helen C. Smith et al., A-26968 etc. (March 4, 1955).

The record also reveals that the lands are located in the Susanville Grazing District and are needed in conjunction with the management of other public lands in the area. The record indicates that the Bureau has an active management program under way to increase forage production on the lands to relieve other overgrazed areas within the grazing district. The Department has consistently held that factors of grazing administration may be properly considered in determining the public interest in matters of public land classification. See George C. Low, A-25725 (December 22, 1949).

Moreover, practically all of the lands embracing the better soil sites on the Madeline Plains have already been patented. No more than 26 acres of the patented lands have been developed for irrigated crop production by pump irrigation from wells. Furthermore, the record reveals that the soils on the 26 acres which have been reclaimed for irrigated crop production are more productive than the soils on the lands here involved.

The appellants have submitted no persuasive showing either with their applications or their appeals that the lands are susceptible of irrigation by any practical means.

Conclusion

Certain of the appellants allege that their applications should not have been rejected because the lands had at one time been classified as suitable for entry. However, the fact that certain.

of the lands may have been classified as suitable for desert land entry at some time in the past does not preclude the reclassification of the lands at any time where appropriate. Cf. Franklin P. Butts, A-26801 Supp. (November 15, 1954). Such a classfication is not immutable. While it may represent the considered judgment of the classifer based upon evidence available at the time the classification is made, it is subject to revocation or revision upon a showing of changed conditions, additional facts, or other factors indicating error in the classification. Acting Solicitor's Opinion, 61 I.D. 277, 278 (1954). 15/

The fact that State law governs generally the existence or the acquisition of a right to use water for irrigating a desert land entry, or that a person has a State permit to use underlying ground water, does not foreclose a departmental determination under applicable Federal law of the sufficiency of the water supply to justify acceptance of additional desert land entries. Availability of water in any area of limited supply is of controlling importance in determining under Federal law the suitability of public lands for entries of this type. 16/ All existing entitlements are to be considered. Indeed, section 4 of the Desert Land Act of March 3, 1877, 17/ as added, requires a showing in the plans submitted by desert land entrymen of sufficient water to irrigate thoroughly and reclaim the lands. This is implemented by detailed regulations issued 18/ under the general regulatory authority of the Secretary of the Interior. 19/ These administrative implementations and the determinations made under applicable Federal law do not constitute efforts either to establish or prejudge existing rights of landholders to the use of water under applicable provisions of State law. The extent of a correlative right to use water is determined generally by the laws of that State. 20/

15/ Requests for special land-use permits to drill and explore for water will not be issued where records indicate there is no water available for the irrigation of additional lands in the areas involved. See Peter W. Breene et al., supra.

16/ See Ruby E. Huffman et al., 64 I.D. 57, 69-70 (1957)

17/ 19 Stat. 377, 43 U.S.C., 327

18/ 43 CFR, 1954 ed., Part 232

19/ R.S. § 2478, 43 U.S.C., 1201

20/ See Ruby E. Huffman et al, supra, page 60 and the California decisions cited therein.

As to appellant's request for a hearing, a hearing is not held as a matter of right in classifying public lands. Cf. Leonard E. Noren et al., A-27147 (August 1955). The appellants have had the opportunity to put into the record any information they desired. In Margaret A. Andrews et al., 64 I.D. 9 (1957) the Department stated that a hearing will not be granted where there is no reasonable likelihood that it would develop facts decisive of the issues and no showing has been made by the appellants that they would be able to present evidence controverting the facts of record. Accordingly, the request for hearing is denied.

The Manager's decisions rejecting the desert land applications are affirmed.

Adolph S. Erickson and the other appellants listed in the appendices to the decision are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00 for each separate application which is appealed. In taking an appeal there must be strict compliance with the regulations.

For the Director:

a.H. Furr

Enclosure

DISTRIBUTION:

Mr. William Blair Dalbey, Attorney at Law (Certified Mail)
Colman and Rotunno, Attorneys at Law (Certified Mail)
Clyde C. Downing, Attorney at Law (Certified Mail)
Mr. George C. Black, Attorney at Law (Certified Mail)
Mr. Burke Mathes, Attorney at Law (Certified Mail)
Each appellant in Appendices "A" through "O" by certified mail, except those represented by attorneys who will receive courtesy copy by regular mail
Hon. Harry R. Sheppard, House of Representatives (Regular Mail)
Hon. Edgard W. Hiestand, House of Representatives (Regular Mail)
Lands Staff Officer
Appeals List No. 1
CFG

Appendix "A"

Name of Applicant	Serial Number
Adolph S. Erickson	Los Angeles 0154243

Appendix "B"

Name of Applicant	Serial Number
Minnie Janet Weeks	Los Angeles 0127712
Kenneth W. Allen	0129221
Ernest W. Sawyer, Jr.	0129688
Ernest G. Erickson	0129335
Ernest W. Sawyer	0129843
Henry Walker	0152807
Donald Bruce Geddes	0161147
John Alexander Paton	0157125
Leo R. Facto	0101712
Virginia M. MacQuarrie	0122307
William Herbert Parker	0131567
Elaine Jule Parker	0131568

Appendix "C"

Name of Applicant	Serial Number
Julius D. Hohensee	Los Angeles 0159640
Maude M. Knight	0159857

Appendix "D"

Name of Applicant	Serial Number
Myrtle L. Burdick	Los Angeles 0158797
E. Leroy Burdick	0158799
Edna B. Burdick	0158800
Edwin C. Burdick	0158802

Appendix "E"

Name of Applicant	Serial Number
James Lee Coleman	Los Angeles 0161779
Anthony J. Taravella	0158850

Appendix "F"

Name of Applicant	Serial Number
Lawrence C. Wall, Jr.	Los Angeles 0146715
Erwin E. Stephens, Jr.	0148785
Ruth E. Stephens	0148786
Kenneth A. March, M.D.	0150395
Wells C. Cook	0150648
Francis Andrew Ecker	0152491
Leonard W. March	0153199

Appendix "G"

Name of Applicant	Serial Number
Jack Fogel	Los Angeles 0160463
Wallace H. Nelson	0159770
Merle P. Brooks	0159907
Stanley Nichols	0153459
Nancy C. Nichols	0153462

Appendix "H"

Name of Applicant	Serial Number
Thomas H. Robinson	Los Angeles 0157865
William J. Turpit	0160323
James F. Brooks	0162353

Appendix "I"

Name of Applicant	Serial Number
Robert James Worcester	Los Angeles 0160498

Appendix "J"

Name of Applicant	Serial Number
Mary I. Dick	Los Angeles 0162618
Orville L. Dick	0162619
Ruth B. Eastlund	0162667
Kenneth W. Eastlund	0162668
Othello K. Troxell	0162638
Hazel G. Troxell	0162639

Appendix "K"

Name of Applicant	Serial Number
John A. Perrelli	Los Angeles 0151500
Reveta Bertha Fuller	0160049
Audrey McCoy Quarles	0160204
Frances Magnolia Sides	0160209

Appendix "L"

Name of Applicant	Serial Number
Lola B. Lovett	Los Angeles 0146929
Don D. Armentrout	0146930
Robert A. Robinson	0147111
Kenneth S. Brown	0147285
Florence Meador	0147895
Wilford M. Swope, Jr.	0148120
Ernest D. Armentrout	0148198
William T. Chandler	0149376
Len A. Chitwood	0149377
Leo F. Smith	0158257
David W. Webb	0160533
Jeannette J. Brown	0160790
Herbert E. Owens	0160791

Appendix "M"

Name of Applicant	Serial Number
Louis Mattis	Los Angeles 0143364
Nadine V. Santino	0146431
William H. Arnold	0146463
Daniel P. Demaree, Sr.	0146504
Daniel P. Demaree, Jr.	0146505
Margaret L. Bernhardt	0149327
Carl C. Bernhardt	0149491
Gerald W. Hammond	0149664
Wade F. Sonne	0149722
Burnis J. Sharp	0150417 as amended
Anthony Ruiz, Jr.	0150418
Pascal A. Distefano	0150419

Appendix "M" (continued)

Name of Applicant	Serial Number
Walter F. Vierra	Los Angeles 0150420
Harry J. Vierra	0150709
Joseph P. Vona	0150710
Josephine G. Farfan	0150711
Albert Sabatino	0150712
Lucy T. Vierra	0150713
Adalgisa L. Distefano	0150714
George A. Fletcher	0150916 as amended
J. Clovis Sharp	0154466
Mary A. Fletcher	0154844 as amended
Joe Davajon	0156370
Howard L. McBeth	0156371 as amended
Gladys R. Sharp	0150639 as amended

Appendix N"

Name of Applicant	Serial Number
Kasuko Ige	Los Angeles 0160918
Tadao Ige	0160919

Appendix "O"

Name of Applicant	Serial Number
Phyllis A. Hook	Sacramento 057251 ✓
Donald Dean Hook	057252 ✓
Pete A. Perlain	057262 ✓
Harold R. Slack	057263 ✓
Charles M. Thompson	057269 ✓
Mollie L. Thompson	057270 ✓
Merritt N. Van Sickle	057271 ✓
Olivia M. Van Sickle	057272 ✓
Robert D. Pressler	057273 ✓
Robert A. Dias	057274 ✓
Virginia D. Seaton	057277 ✓
Donald C. Seaton	057278 ✓

appeal to Sec
affirmed 2-12-63

DOCKET FILES

DEPT. OF INTERIOR
SACRAMENTO, CAL.
JUL 3 10 39 AM 1961
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:

Sacramento 064639
6.05c

June 20, 1961

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

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DECISION

Helen V. Ivanhoe : Desert Land Application

Decision Affirmed

Mrs. Helen V. Ivanhoe has appealed from a decision, dated March 14, 1961, rejecting her desert land application for the reason that withdrawals from the existing supply of underground water already greatly exceed the total recharge to this supply, with the result that underground water levels have steadily declined.

The appellant has not denied the truth of the findings embodied in the decision appealed from, but alleges that since the land is covered by alkali, it will take several years to reclaim it through leaching, and that this process will not require as much water as irrigation. Mrs. Ivanhoe asserts that by the time the land has been reclaimed by leaching, other water will be available from the canals of the proposed Feather River Project. Until such waters are available, the applicant states that she intends to devote the land to "wild waterfowl farming."

An application for desert land entry must be rejected where there is not satisfactory evidence that sufficient water is presently available to irrigate the land applied for. Inez Ruth Stevens et al., A-27990, A-28054 (August 28, 1959). The classification of land covered by a desert land application as unsuitable for cultivation because of insufficient annual replenishment of the ground water table is proper, and the classification will not be disturbed in the absence of positive and substantial evidence that it is erroneous. Pearl Y. Hogle et al., A-27889 (April 23, 1959).

Accordingly, the decision appealed from is affirmed.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Appeals Officer

Enclosure

DISTRIBUTION:

Mrs. Helen V. Ivanhoe (Certified Mail)
Lands Staff Officer
SD (California) /
LO (Sacramento) ✓
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SACRAMENTO, CALIF.

appeal to Sec
affirmed A-29220
3-11-63

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DESERT LAND * 1 Generally

ADJUDICATION * 3 Equitable Adjudication

A canceled desert land entry will not be reinstated unless facts are established or errors of law discovered showing the cancellation of the entry was improper.

The principle of equitable adjudication does not apply to entries which have been canceled because the entrymen failed to reclaim the land and submit annual proof as required by law.

Umberto Sarno, Phyllis Ruggio, Los Angeles 0104863, 0104864 (September 8 ,1961)

LO

appeal to

In reply refer to:

Los Angeles 0104863
0104864
6.05c

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 8, 1961

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DECISION

Umberto Sarno :
Phyllis Ruggio : Desert Land Entries
:

Decision Affirmed

The above-named parties have appealed from a decision, dated March 16, 1961, rejecting their petitions for the reinstatement of their canceled desert land entries under the principle of equitable adjudication. The decision held that equitable adjudication does not apply in these cases so that there was no need to forward the petitions to the Director of the Bureau of Land Management. It then held that a consideration of the petitions in the Land Office failed to disclose any grounds for the reinstatement of the entries.

In their appeal, the petitioners assert that they have at all times exercised good faith, but that they became confused as to the procedural requirements of the desert land laws. They contend that the principle of equitable adjudication does apply, and that the petitions should have been forwarded to the Director for consideration.

A review of the record shows that the entries were properly canceled, after due notice, for the reason that the entrymen had failed to reclaim the land and submit annual proof in conformance with the applicable law. (43 U.S.C., 1958 ed. 328; 43 CFR 232.19.) The requirement that a desert land entryman file during each year proof of the expenditure of one dollar per acre is mandatory. Neither the Director of the Bureau of Land Management nor the Secretary of the Interior has the authority to extend the time within which to make such expenditures and to furnish proof thereof. Durward E. Fry, 45 L.D. 172 (1916). Hence, the principle of equitable adjudication may not be applied to the entries in question, because this principle extends only to suspended (not canceled) entries which are "so far complete in themselves, that, when the defects on which they are submitted have been cured by its action, they pass at once to patent." Elizabeth Richter, 25 L.D. 1 (1897).

Although reinstatements may be granted in proper cases, 43 CFR 105.2, the facts here do not authorize such action. An entry will not be reinstated unless facts are established or errors of law discovered showing that the cancellation of the entry was wrongful. Wiley v. Patterson, 13 L.D. 452 (1891).

Accordingly, the decision appealed from is affirmed.

Each of the appellants is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick

Acting Chief, Division of Appeals

Enclosure

DISTRIBUTION:

Umberto Sarno (Certified Mail)
Phyllis Ruggio (Certified Mail)
Hon. Harlan Hagan, House of Representatives
Hon. Glenard P. Lipscomb, House of Representatives
Lands Staff Officer
Case File
Perm. File
Appeals Reading File
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Appeals List No. 1
LLM

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
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Sacramento 058104
058105

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SACRAMENTO, CAL.
DEC 18 10 00 AM 1961
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

December 7, 1961

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DECISION

Edith A. Roberts :
John W. Roberts : Desert Land Applications

Decision Affirmed

The above-identified parties have appealed from a decision of the Manager, dated May 2, 1961, rejecting their desert land applications because they had not made a positive showing that irrigation water is available in sufficient quantities to support the economical development of the lands for which they have applied. The decision also held the soil analysis submitted by the applicants to be inconclusive as the soil samples were not taken by a recognized soil technician or other person qualified to take representative soil samples.

The regulations do not disqualify an applicant from taking his own soil samples or otherwise require that they be taken by recognized experts. Nevertheless, the rejection of the appellants' applications must be sustained because they have not submitted plausible presumptive evidence that there is available for their use a permanent, adequate source of irrigation water.

An examination of the record discloses that the appellants intend to obtain water for the irrigation of their proposed entries by constructing a dam across an unnamed wash to impound the late winter and early spring runoff. The appellants cannot, however, submit reliable statistics showing that they could impound each year sufficient water to irrigate all of the irrigable portions of the applied for lands. Affidavits which are, in effect, only expressions of opinion that sufficient water is available each year do not make the required showing. Nor does an approved permit from the State to appropriate up to 180 acre-feet of the waters of the unnamed stream tributary carry with it any assurance that 180 acre-feet will in fact be available to the applicants each year. Therefore the applications cannot be allowed. In the absence of positive evidence of an adequate supply of water for irrigation purposes, land is properly classified as unsuitable for entry under the Desert Land Act. Marie L. Jenkins, Virginia M. Ohrt, A-28089 (August 25, 1959); Helen Douglas Garner, A-28302 (January 18, 1961).

Accordingly, the decision appealed from, as modified by this decision, is affirmed.

Each of the appellants is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5 for each application upon which favorable action is sought. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick

Legal Assistant
Division of Appeals

Enclosure

DISTRIBUTION:

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John W. Roberts (Certified Mail)
Honorable Harold T. Johnson, House of Representatives
Chief, Division of Lands and Recreation
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Bureau of Land Management
Washington 25, D. C.

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6.05c
Los Angeles 0131580

November 28, 1962

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DECISION

Charles Schoenburg : Desert Land Entry

Decision Affirmed

Charles Schoenburg has appealed from a decision, dated August 22, 1962, which held his final proof for rejection in part, cancelled his entry in part, and requested acknowledgment of mineral reservation on those lands embraced within his entry. The rejection was based upon an "inadequate irrigation system." The decision recited that the map submitted by Mr. Schoenburg in response to an official request indicated that the entryman plans to run irrigation furrows from the S½S½ of Lot 12 to the north end of Lot 11, a distance of approximately 2,300 feet. The recommended maximum length of such furrows as indicated by the Irrigation Advisors' Guide is 1,320 feet. Based upon this margin of difference, it was concluded that the former length cannot be considered as meeting the requirements of regulation 43 CFR 232.30 and consequently the final proof involved is inadequate.

In his statement of reasons, appellant contends, in essence, that 43 CFR 232.30 requires only that all the permanent main and lateral ditches necessary for the irrigation of all irrigable land in the entry have been constructed so that water can be actually applied to the land. "The law does not [appellant continues] require that a farmer use the most efficient farming . . ." techniques. Moreover, appellant argues even though ". . . the Irrigation Advisors' Guide recommends a maximum length of 1,320 feet or less for irrigation furrows, it does not mean that a successful crop cannot be raised by using less efficient irrigation methods, namely, longer furrows."

In support of appellant's argument above, there was submitted with his statement of reasons three letters indicating that longer furrows may be used in successful farming operations. The first letter examined was written September 12, 1962 from one Jerome J. Molof, Work Unit Conservationist, United States Department of Agriculture. We quote Mr. Molof as follows: "In reference to length of rows now used throughout the Valley, farmers have anywhere from 660 to 5,280 feet. The shorter rows, which can vary from 660 to 1,300 feet, are used generally for the vegetable crops. The longer rows, from 1,320 to 5,280 feet, are used for alfalfa, sugar beets and cotton crops." Mr. Molof concludes his letter with a note of caution: "You must realize that the shorter the row the greater the water efficiency, especially if the soils are on the sandy side."

A second letter, dated September 7, 1962, from one James P. Jones, Farm Advisor, Agricultural Extension Service, University of California, states in pertinent part, "Runs of these lengths [2,300 feet] are certainly not the most efficient and we do not recommend their use. However, if one is willing to accept the low efficiency, runs of this length are possible."

The third and a final effort on the part of appellant to furnish competent opinion evidence in support of assertions made in his appeal is a letter, dated September 11, 1962, from one Don Cannon an alleged "grower of 2,700 acres." Mr. Cannon is apparently in complete agreement with the use of irrigations runs in the Imperial Valley of 2,500 feet in length. He states, *inter alia*, "My personal liking is for 2,500 foot runs. This allows maximum water and labor efficiency."

The now difficult portion of this decision is to evaluate and weigh in the conclusion warranted the statements contained in the letters outlined above. Inasmuch as appellant selected specific persons of experience and authority, we think it not unfair to consider as evidence in his behalf a consensus of the opinion evidence presented. Two of the three letters submitted specifically caution appellant that shorter irrigation runs provide greater water efficiency and long irrigations runs of 2,300 feet are deemed inefficient and therefore not recommended. This advice is diametrically opposed to that information disseminated by Mr. Cannon's letter wherein he asserts that irrigation runs of 2,500 feet provide for maximum water efficiency. Our inclination, based upon the above reasoning, is to give the greater weight to letters one and two and disregard completely letter number three.

The mere fact that 2,300 feet irrigation runs can be and have been used is not of itself a sufficient basis upon which to sustain appellant's position in this appeal. Substantial questions of economic feasibility and even economic practicability are raised with no apparent and satisfactory answer given.

In any event appellant has not by substantial affirmative evidence shown the decision appealed from to be error. The Department has held with consistence that the burden is upon appellant in comparable circumstances. Cf. *Joseph M. Schuck, et al.*, A-28603 (August 16, 1961).

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Accordingly, the decision appealed from is affirmed without prejudice to appellant filing a new notice of intention and a new final proof when the entry is perfected. Such final proof must be made prior to the expiration of the statutory life of the entry, which has been extended to January 24, 1963. The appellant has not appealed from that portion of the Land Office decision requesting him to acknowledge the classification of the land as prospectively valuable for oil and gas, or to request a reclassification of the land as nonmineral. Therefore, the entry and any patent issued therefor will be impressed with a reservation of such minerals to the United States pursuant to the Act of July 17, 1914 (30 U.S.C. 121). See 43 CFR 1961 Supp. 102.22(a).

Charles Schoenburg is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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In reply refer to:
6.05c
Los Angeles 039478

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

December 14, 1962

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Return Receipt Requested

DECISION

Clifton O. Myll	:	Desert Land Entry
	:	

Decision Affirmed
Entry Cancelled

Clifton O. Myll has appealed from the decision dated May 1, 1962, which allowed him 90 days within which to submit final proof or to show cause as to why his entry should not be cancelled for failure to have complied with the provisions of the desert land law during the life of the entry.

A review of the entire record reveals that the entry was allowed to one Mae E. Patton (now deceased) on June 2, 1917, who submitted three acceptable annual proofs. Because she couldn't obtain sufficient water to make her final proof, she applied for and received extensions of three years each under the Acts of March 28, 1908; April 30, 1912 and February 25, 1925. The statutory life would have expired on June 2, 1930, however, the land was withdrawn for reclamation purposes in connection with the Yuma Project on October 19, 1920, and the entry was, therefore, properly suspended under the principles enunciated in the decision in the case of Maggie L. Havens, A-5580 (October 11, 1923) until water for irrigation purposes became available from the project. Water from the project became available in 1954 and the entrywoman was so notified by registered letter, addressed to her address of record on June 3, 1954. The entrywoman was deceased at the time and there is no evidence that any of the heirs received the notice. However, under the applicable regulation, 43 CFR 1954 ed. 220.10(f) in effect at that time, the registered letter addressed to the entrywoman at her address of record constituted constructive service. It was incumbent upon the heirs to notify the land office immediately of the death and designate one of the heirs to receive such notices. See 43 CFR 1954 ed. 232.11. The statutory life of the entry, therefore, expired on June 3, 1954, although the land office took no action to close the case.

On March 24, 1959, the appellant filed for approval an assignment from all the heirs of the deceased entrywoman (approximately five years after expiration of the statutory life of the entry). This assignment was approved by the land office in a decision dated July 20, 1959, by which a prior application for assignment was also rejected and a contest against the entry was also dismissed. The senior assignee and the contestee both appealed this decision. The land office decision was affirmed by the Director and the Secretary. See Director's decision, Randolph Ritchey v. Estate of Mae E. Patton et al., Los Angeles 039478 (August 8, 1960) and Secretary's decision, Randolph Ritchey v. Clifton O. Myll and Mary E. Kindy, 68 I.D. 269 (September 27, 1961). However, an assignee of a desert land entryman receives no better title than the assignors can give and since the statutory life of the entry had expired prior to the date he received the assignment he would be required to show all reclamation had been accomplished prior to June 3, 1954. If he cannot show this, then the entry must be cancelled.

By the appellant's own statements in his brief he admits that the actual reclamation was accomplished after receipt of the Director's decision of August 8, 1960, or more than six years after the actual expiration date of the entry.

Although the entryman has stated that he has under cultivation approximately 13 acres and has expended more than $19,000 in acquiring and developing the entry, he has done so at his own risk and possibly with full knowledge that his title to the entry was in jeopardy. It may also be that he was led into a false sense of security by the land office decision of July 20, 1959, which stated "as reclamation law does not provide for a specific time within which final reclamation proof must be submitted, the heirs of the deceased entrywoman are not delinquent in this respect." While the statement is incorrect, the Department has held that "no rights can be obtained as a result of incorrect information given by land office employees that are not granted by law." Robert L. Miller, 68 I.D. 83 (1961), also Cf. Gerald C Chisum, A-28295 (June 7, 1961). The Attorney General further held that "he (the Secretary) has no authority to make any agreement providing that an entry for the public lands may be consummated in any manner or at any time other than as provided by the law under which such entry is made, and if he should enter into such an agreement it would afford no protection to the entryman." Opinion Assistant Attorney General, 34 L.D. 351, 355 (1906).

Due consideration has been given to the appellant's contentions, however, he has not shown by positive probative evidence that he has complied with the requirements of the desert land law within the statutory life of the entry.

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Harsh as the law may appear in this case, there remains no alternative but to affirm the decision appealed from and furthermore, since it is obvious on the face of the record that the life of the entry expired in 1954 and that all reclamation was accomplished subsequent to that date, the entry must be cancelled.

Clifton O. Myll is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Carroll and Anderson, Attorneys for Appellant (Certified Mail)
Mr. William Dobrovir, Attorney at Law (Certified Mail)
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In reply refer to:
6.05c
Sacramento 072889

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 18, 1963

Certified Mail
Return Receipt Requested

DECISION

Ruth C. Moore	:	Desert Land Application
	:	
	Decision Affirmed	

Ruth C. Moore has appealed from a decision dated September 20, 1962, which rejected her above-noted desert land application because no evidence of water rights accompanied the application.

On appeal the appellant merely states that: "I did not file a water right with my application as the West Side and Wheeler Ridge storage districts are now being formed but, as yet, there are no contracts to anyone in the district. I intend to drill for water if the districts are not formed by the time my final assessment work is due for patent.

"As I clearly stated the underground water source is good, standing at 60'. There are two wells on the adjoining property pumping 1600 GPM and 1800 GPM with 40 hp pumps. As this $S\frac{1}{2}$ of $S\frac{1}{2}$ Sec-14-T-31-S-R-24E adjoins Buena Vista Lake the water can be pumped reasonable for reclaiming the land and for farming."

It is apparent that the appellant is confused as to what constitutes a water right under the desert land law. If she is depending on an irrigation district for water, she must have a document from the district showing that she has the right to the use of sufficient water to reclaim all the irrigable land in the entry. See 43 CFR 232.33. If the entrywoman is depending upon an underground water supply, she must state under what California law she intends to appropriate the necessary water and show an adequate supply to irrigate all of the irrigable land embraced in her entry. See 43 CFR 232.13. If such evidence does not accompany the application it must be rejected. In this case the entrywoman shows on her application that she intends to appropriate underground water but she has given no indication of her right to appropriate such water. See 43 CFR 232.13.

It is also noted that the application did not include a detailed and accurate map showing the plan of irrigation as required by item 12 of the application form. The Department has consistently held that applications which do not contain all the information called for in the application and required by the regulations must be rejected. Cf. Eric W. Erickson et al., A-27579 (July 3, 1959).

Inasmuch as the application was deficient as shown above, the decision appealed from is hereby affirmed.

Ruth C. Moore is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D. C. and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 7, 1963

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DECISION

Albert V. Mouser : Desert Land Application

Decision Affirmed

Albert V. Mouser has appealed from a decision, dated October 24, 1962, rejecting his above noted desert land application for the reason applicant indicated his source of irrigation water to be underground, supplied by means of a well, and failed to file a detailed plan describing his source of water supply at the time he filed his application, as required by 43 CFR 232.14 quoted in the decision.

The above cited regulation provides:

> "If the irrigation is proposed by means of artesian wells or by pumping from nonartesian underground sources of water supply, a statement must be submitted as to the existance of such water supply on or near the land involved, including information as to other wells theretofore sunk and affording a water supply to adjoining or nearby lands."

The appellant does not challenge the correctness of the decision. For his appeal he submits information compiled by the S. A. Camp Pump Company concerning the approximate location and capacity of 5 underground wells situated over a wide area from subject land, and a copy of an unsigned well test report dated September 12, 1955 for the Kern County Golf Course. The appellant asserts that the information submitted should evidence the existence of water on the land involved.

The evidence submitted by the appellant is not sufficient to show the existence of an underground water supply on or near the land involved, nor is there a showing that the wells, only one of which is indicated to be used for agricultural purposes, afford a water supply to adjoining or nearby lands. Moreover, a desert land application must be accompanied by all of the evidence required by the cited departmental regulations, *supra*. When the application is not accompanied by such evidence as required by the applicable regulations, the application is properly rejected. *Frances E. Auen*, A-28440 (April 7, 1961), and cases cited therein.

Accordingly, the decision appealed from is affirmed.

Albert V. Mouser is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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appeal to Sec
affirmed A-30074
8-18-64

DOCKET FILES
5-6-63

DESERT LAND (1) Generally (Assignment)

The assignment of a desert land entry by an entryman who elects to suspend cultivation pursuant to the provisions of the Act of July 30, 1956 (70 Stat. 715) is null and void, even though the assignment was recognized by the Land Office.

Muriel E. Nunnelley et al, Los Angeles 0104532

DEPT. OF INTERIOR
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appeal to Sec

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SACRAMENTO, CAL.
MAY 21 2 46 PM 1963
BUREAU OF LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Los Angeles 0104532

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

May 6, 1963

Certified Mail
Return Receipt Requested

DECISION

Muriel E. Nunnelley, Assignee :
: Desert Land Entry
Charles T. McCormack, Assignor :

Decision Affirmed

Muriel E. Nunnelley has appealed from a decision, dated December 19, 1962, declaring null and void an assignment made to her in 1961 of the above noted desert land entry by Charles T. McCormack. The stated reason for this action was that the entry was not subject to assignment after October 2, 1956, because a suspension of the cultivation and improvement requirements was granted to Mr. McCormack pursuant to section 1 of the Act of July 30, 1956 (70 Stat. 715), and under section 3 of the Act, the entry was not assignable prior to the issuance of a patent.

The assignment by McCormack to Nunnelley was recognized by a Land Office decision, dated September 29, 1961, and she was advised that she had assumed all of the rights and responsibilities of the original entryman.

The appellant alleges that the mistake by the Land Office in recognizing the assignment would result in a loss to her of more than $30,000 if the decision declaring the assignment null and void is affirmed.

The assignment of the desert land entry was expressly forbidden by the Act of July 30, 1956, supra. The United States cannot be bound by the unauthorized acts of its agents. Cf. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Calazona Fertilizer Company, 66 I.D. 4 (1959). Therefore, the assignment was of necessity correctly declared to be null and void.

Accordingly, the decision is affirmed.

Muriel E. Nunnelley is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

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In reply refer to:
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Riverside 01808

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 17, 1963

CERTIFIED MAIL
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DECISION

Floyd Graham : Desert Land Application
:
:

Decision Affirmed

Floyd Graham has appealed from a decision dated October 23, 1962, rejecting his desert land application for failure to make a satisfactory showing that his prior desert land entry was abandoned for reasons beyond his control. [1]

It was determined in the decision appealed from that the appellant's asserted failure to obtain financing to perfect the prior entry over a 4-year period was not acceptable as a reason beyond his control for abandonment of the prior entry. The showing submitted indicated the appellant's reason for abandoning his former entry was because the entry was not allowed until it was too late to obtain a cotton allotment, the appellant having depended upon cotton ginning firms to advance him the necessary funds to perfect his entry. The decision appealed from held that in order to obtain an extension of time in which to perfect an entry, an entryman must show unavoidable delay through no fault of his own. Lack of finances alone was stated as not an acceptable reason.

Mr. Graham indicates on appeal that the Land Office Manager misinterpreted his stated reasons for abandoning his former desert land entry; that an extension of time was not a factor in his prior entry, and he had no financial problems at that time. He asserts the problem was one of obtaining permission to plant crops which would justify the expense of reclaiming the land. This he maintains was a problem truly beyond his control. Mr. Graham presents argument to the effect that when he made the prior application there were no acreage controls established by the Government to prevent an entryman from planting crops which would justify reclaiming desert land; that it was denial of permission to plant sufficient acreage that forced abandonment of his prior entry.

---

[1] The record shows that a portion of the land applied for, i.e., Lot 2 of the SW$\frac{1}{4}$, sec. 18, T. 9 N., R. 3 E., S.B.M., is subject to rejection for the reason that such land is patented. Where public land has been patented, the Department of the Interior has no further jurisdiction over the land. Newton's Fork Gold Mining Company, A-27109 (April 27, 1955).

The declaration by Mr. Graham on appeal appears to be a self-serving statement without corroboration. The determination as to the type of crop or crops to be grown on his prior entry was made by Mr. Graham himself, not the Government; he could have decided to grow a non-allotted crop or a type of crop for which there were no acreage controls established. The record relating to Mr. Graham's prior entry (Nevada 06388) discloses that he did not, after due notice, comply with the mandatory requirements of the desert land law and regulations that a desert land entryman file annual proofs showing acceptable expenditures in the necessary irrigation, reclamation and cultivation of the land within his entry, within the time allowed. For failure to comply with the requirements or show cause why his claim should not be canceled, the entry was canceled and the case closed.

The statute upon which Mr. Graham's application is predicated (43 U.S.C. sec 182) provides that a person otherwise duly qualified to make entry under the desert land law is allowed a second entry only where it is established that his prior entry was made in good faith and was lost, forfeited, or abandoned because of matters beyond his control. See also 43 CFR 232.6. The principle of allowance of more than one entry is therefore clear.

On the basis of the record, it is concluded that the appellant has not made a satisfactory showing under the desert land law and regulations to qualify for acquisition of a second desert land entry. Cf. Walter E. Pollard, A-28315 (June 9, 1960).

The decision appealed from is accordingly affirmed.

Floyd Graham is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

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appeal to Sec 8-16

Cy in file

Dismissed

Ltr Dec A-30110 —11-5-63

In reply refer to:
6.05c
Sacramento 058281

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 20, 1963

Certified Mail
Return Receipt Requested

DECISION

Elgie M. Masson : Desert Land Application

Decision Affirmed

Elgie M. Masson has appealed from a decision, dated January 24, 1963, rejecting her desert land application for the reason the applied-for lands are not agricultural in character, because, among other things:

1. The growing season is only 60 days, with frost occurring every month of the year.

2. Precipitation, which is normally about 8 inches, is insufficient for dry-land farming and the applicant's well production of 430 GPM is sufficient to irrigate only 48 acres of pasture or 70 acres of cereals at 50% efficiency.

3. Income from non-price supported cereals which could be grown in the Madeline Plains area is too low to support a farm family, considering the acreage for which water is available, distance to market, and the non-availability of labor in the area.

The appellant appealed as to 160 of the 320 acres for which she had applied and she alleges that:

1. The 430 GPM well she developed at a cost of $5,000 will provide irrigation for approximately 160 acres.

2. The land is located on the Susanville-Reno Road and in this vicinity the farming of productive crops is carried on regularly at altitudes of 5,000 feet or higher.

3. In all of the area within a radius of 50 miles, frost can occur every month of the year but this does not prevent the cultivation of good alfalfa crops.

4. ". . . I claim that by following the modern practice of reservoir irrigation, I can probably irrigate alfalfa crops on the entire 160 acres . . . ". (underline added).

5. ". . . a reservoir could store in excess of two million gallons of water to provide six to eight acre feet of water with which to irrigate said 160 acres."

6. ". . . Under modern practices my family can handle the matter of labor and I would not have a labor problem."

7. ". . . I have the means and financial ability and through the assistance of my husband, a competent well driller, I have located sites for development of additional wells on said 160 acres if the application is granted. . . ."

8. ". . . I would be deprived of the investment I made in good faith to develop and acquire this property when I intend to follow the practices of good farmers in this State."

The appellant's application for entry, filed on April 14, 1959 states:

> "2 Land will receive its supply of water from well and into a 6 inch main ditch, and into lateral ditches. . . ."
>
> "4 Description of well:
> Approximately 280 feet deep, with 14 inch casing. Should produce over 3,000 gallons of water per minute. . . ."
>
> "Character of soil is sandy, ... The growing season in the area is around 140 days, . . . Any average crop, such as alfalfa, grain, barley, or hay, should do very well . . . . Contour of land is such that it can be irrigated from proposed plan of irrigation and improvement. . . ."

The applicant was notified on October 30, 1959 that the allowance of the application is subject to proof that adequate irrigation water can be developed.

The appellant's well log, filed on July 29, 1960, states:

> "Will set permanent pump about 200 ft. deep, capable of a capacity of 500 gal. per minute. By pumping twenty four hours per day to reservoir will allow us 1,000 G.P.M. for twelve hour distribution. Should be able to irrigate around 200 acres in heavy to medium soil."

The special land use permit issued to Mrs. Masson on December 17, 1959, for the purpose of drilling a well was extended to June 17, 1960 and after completing the well, a second extension was granted until October 1, 1961. On October 13, 1961 the appellant's application for desert land entry was rejected and an extension of the Special Land Use Permit was denied. An appeal was taken from that decision and on May 31, 1962 the decision was affirmed as modified, to the extent she could demonstrate that she had developed a sufficient source of underground water to irrigate 160 acres of the land.

At this point, it is appropriate to note that none of the basic statements made by the appellant in her application for entry are any longer relied upon by her for accuracy. That is, the well she drilled cannot produce "over 3,000 gallons of water per minute", the contour of the land she relied upon is not such that it can be irrigated from the "proposed plan of irrigation", the growing season she described is not "around 140 days", and any average crop will not "do very well" on that land. Moreover, although the appellant's husband is a professional well driller by occupation, he has not been able to complete the additional wells necessary to reclaim the land. Thus, the reservoir storage plan is actually in the nature of an afterthought, the feasibility of which has been carefully considered by the Bureau's land specialists in a report dated May 10, 1963 which states:

1. The only knoll on the subject land which could be used for a reservoir to provide gravity flow is within the U.S. 395 right-of-way which may not legally be encroached upon. Thus, by having to move a reservoir site further to the northeast costs would increase substantially, because of the increased height of the walls of the northeastern side.

2. Under the best conditions, a 2,000,000 gallon reservoir could irrigate 48 to 80 acres every 17 days and to prolong the irrigation period would be disastrous.

3. The appellant's pumping level is 140 feet. Experience in northern California has shown that when the pumping level exceeds 100 feet, the costs exceed returns.

4. The owners of one going operation similar to that proposed by the appellant find it very difficult to irrigate 80 acres with a 550 GPM well.

5. Crops grown on the lands, which the appellant cites as examples to prove her assertions, are Class II and Class III soils, whereas the applied-for lands are in the Class VI category. These operations get only one cutting per year and 3 tons per acre is unusually good. The receipts therefrom are about $20 to $25 per ton.

6. The average costs of developing virgin land in this area is between $200-$300 per acre, of which $60 to $80 is for land leveling only. The estimated cost of a 6 acre foot (2,000,000 gallon) reservoir is $2,700 plus the cost of outlet pipes and other fittings. Add to these costs the cost of 3 or 4 additional wells (for only 160 acres) and compare it to the revenues of $60 per acre for alfalfa, and the project is plainly impractical.

In addition to the foregoing, U. S. Department of Agriculture Farmers Bulletin No. 1857 states on page 5:

> "The small irrigation pumping plant should be large enough to supply at least 2 inches of water over the irrigated area every week during dry periods. For example, if the plant is to be operated 7 days a week and 24 hours a day, its capacity must be about $5\frac{1}{2}$ gallons per minute for each acre irrigated"

Thus, 880 GPM would be required for 160 acres.

The appellant has not submitted any substantial, probative evidence showing that she can expect to profitably develop the 160 acres of Class VI lands, which are located at an elevation of 5,300 feet, with a 450 GPM well. On the other hand, the Bureau's land specialists have shown conclusively that such an accomplishment is practically impossible.

The appellant did not "invest" $5,000 in the land, as she alleges. She knew that her application for desert land entry would not be allowed unless she could demonstrate that sufficient water was available to irrigate the land. The special land use permit gave her no interest whatever in the lands she sought to enter. Thus, she voluntarily exposed herself to the risk of losing all, upon her failure to develop an adequate supply of underground irrigation water. Moreover, the well was drilled by her husband, who did not spend his time on the subject land when there were well-drilling jobs available that he did for others.

Consequently, nearly all of her loss was in the form of time and effort spent on the land, with very little out-of-pocket expense.

The Department has held that where a desert land applicant who was granted a special land use permit fails to show that sufficient irrigation water exists on the land, the application is properly rejected. Joseph D. and Violet C. Swenson, A-28028 (August 21, 1959).

Accordingly, the decision is affirmed.

Elgie M. Masson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION
Mrs. Elgie M. Masson (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
MHS

appeal to Sec
affirmed as modified
A-30100 9-24-64

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JUL 5 1963
SACRAMENTO LAND OFFICE

In reply refer to:
6.05c
Los Angeles 039579

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 25, 1963

Certified Mail
Return Receipt Requested

DECISION

Heirs of Charles E. Payne, deceased :	Desert Land Application

Decision Affirmed

The widow and the two daughters of Charles E. Payne, deceased, have appealed from a decision, dated February 26, 1963, rejecting the application for desert land entry filed by Charles E. Payne on January 6, 1920. Final action was suspended on the application pending a determination of whether a sufficient source of irrigation water was available to reclaim the 160 acres of land described in the application. This suspension was lifted on April 26, 1923. However, no final action was thereafter taken on the application for desert land entry because it was believed that the application came within the scope of departmental decision Maggie L. Havens, A-5580 (October 11, 1923) which suspended all allowed entries in the area indefinitely, until water for the irrigation of the lands becomes available. It has now been determined by the Land Office that the suspension, under the ruling in the Havens case applied only to the allowed entries and not to applications for entry. Consequently, the application was rejected pursuant to the order of the then Commissioner of the General Land Office, dated January 27, 1920, which directed that ". . . all pending unallowed desert land applications will forthwith be rejected."

The appellants allege in their statement of reasons for appeal that:

1. "We are convinced that an estoppel to such a decision exists . . ."

2. ". . . Captain Payne had understood that his application was allowed effective January 6, 1920. Letter from your Los Angeles office dated June 7, 1949, . . . confirms this fact."

3. They relied upon the suspension and had the application for entry not been suspended, the entry would have been perfected many years ago through the development of wells.

4. The Bureau's errors should not jeopardize the appellants' rights to perfect the entry.

The erroneous suspensions and delays attributable to the then Land Office personnel are regretable. However, the doctrine of estoppel does not apply against the Government and the United States cannot be bound by the unauthorized acts of its agents. Cf. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *Calazona Fertilizer Company*, 66 I.D. 4 (1959).

It is true that a letter of June 7, 1949 from the Land Office, addressed to Mrs. Margaret Amelia Payne, states that the desert land entry was allowed January 6, 1920. However, another letter from the same office, addressed to Mrs. Margaret Payne on July 31, 1952 states that, "A review of the records shows that this entry was never allowed as the case was indefinitely suspended pending a determination as to whether or not water from the Imperial Irrigation District would be available for reclamation of the land."

There does not appear to be any factual basis for the appellants' belief that the entry could have been perfected, but for the suspension order. A report prepared by a Special Agent of the General Land Office, approved May 13, 1920, considered the proposed irrigation of the land from water to be developed in wells and it states:

* * * *

> "The wells referred to are known as the Hudson Wells, and I have in the past obtained complete data on said wells.
>
> ". . . Numerous attempts have been made in the locality to produce water in sufficient quantities in wells for irrigation purposes, and all have been failures.
>
> "The territory is not underlain with an abundant water supply, and it is a territory which would require a great deal of water for irrigation purposes, it is not believed that the lands can be profitably reclaimed from the underground source of supply."

Thus, it appears that the appellants received a benefit, rather than suffered a loss by the suspension orders: Because, had an adequate supply of irrigation water been discovered or developed for the area, during the years ensuing between the date the application was filed and the date it was rejected, the application might have been entitled to be considered for entry, notwithstanding the previous failure to timely reject the application. Consequently, the Bureau's errors have not jeopardized the appellants' alleged rights to perfect the entry. Furthermore, departmental decision, *Hazel, Assignee of Patterson* 53 L.D. 644 (1932) has held that the suspension allowed by the *Havens* case applies only to a desert-land *entryman who has met all the requirements which he could possibly meet* and has his entry ready for irrigation but through no fault of his own has been unable to obtain a sufficient water supply to reclaim the land in the entry.

The applicants' entry has never been allowed and under the provisions of the law and the regulations, it never was allowable. Therefore, the decision rejecting the application was proper and it is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo

For Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION
Mrs. Margaret A. Payne (Certified Mail)
Hon. James B. Utt
Division of Lands and Recreation
Appeals List No. 1
MHS

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EPT. OF INTERIOR
ACRAMENTO, CAL.

AUG 12 10 00 AM 1963

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In reply refer to:
6.05c
Riverside 02030
02031
August 5, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
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DECISION

Eugene M. Machado :
Milton A. Padlina : Desert Land Applications

Decisions Affirmed

The above-named parties have appealed from identical decisions, dated April 9, 1963, rejecting their above-identified desert land applications for the E½ sec. 21 and the E½ sec. 22, respectively, T. 27 N., R. 4 E., S.B.M. because a field examination shows the subject lands to be not suitable for agricultural development. The stated grounds for rejecting the applications are: (1) the lands are situated in the Amargosa Valley on the east-central edge of Inyo County at an average elevation of 2,500 feet and the average annual rainfall is less than 5 inches, mainly in the form of intense summer storms, (2) the valley is remote from existing or potential markets, Las Vegas being 100 miles to the east and Los Angeles more than 250 miles to the southwest; previously allowed desert land entries in the area, primarily on the Nevada side of the valley, have virtually failed where cotton allotments could not be obtained and existing economic data shows that the area is not economically suitable for agriculture development, (3) there is a long history of agricultural failures in similar valleys in southern California, many of which were more suitable for agricultural purposes than is Amargosa Valley, and (4) the Department's conservation program for the public lands provides in pertinent part that public lands which are marginal for agriculture, or which are more valuable for other uses than agriculture, will not be classified for entry under the public land agricultural development laws.

In their identical appeals, the appellants contend that the lands for which they applied are not marginal for agriculture. They assert, in substance, among other things not material to the issue, that the annual 5 inch rainfall is insufficient to produce grass for grazing, partly because the water will not penetrate the hard packed soil, and the lands would require irrigation. The appellants state that the ground should be leveled, checked, subsoiled, treated and leached to put it into proper condition for forage crops which they plan to raise, such as bermuda grass, wheat grass, barley, alfalfa, et cetera, and market livestock. They assert that entries in adjoining sections are being farmed by irrigation well water containing slight amounts of sodium and that the land in some of these entries is similar to the lands for which they applied. With respect to the remote location of markets the appellants state that their present market is Los Angeles and with modern transportation the distance is not a serious handicap. They contend, in substance, that after several years with proper management and modern methods of coping with agricultural problems, the subject lands can be made into full productive, valuable, taxable agricultural lands and that they are willing to try to develop them. The appellants have submitted a soil survey data sketch map of the subject lands and a letter from the Soil Conservation Service, United States Department of Agriculture, purporting to show that the lands are suitable for agricultural development.

The only issue involved is the classification of the lands sought. A careful review of the appellants' assertions show that they do not refute, but instead, tend to substantiate the findings in the decisions from which appeals are taken. The letter submitted by them is inconclusive with respect to the lands being suitable for agricultural development and the soil survey sketch map shows that the soils range from Class II to Class VIII, contains some salts and alkali with hardpan underneath the greater portion of the soils making them subject to flooding. The record also shows that a careful economic evaluation of the costs of production and market prices to be expected from the subject lands show that the lands are incapable of returning an economic rent under agricultural production.

The refusal to classify subject lands for agricultural purposes is in compliance with the Department's present conservation program for the public lands, supra. In this connection, it is well established that an application for desert land is properly rejected upon a determination that the land is marginal for agricultural purposes due to poor soil conditions, and there is no positive, substantial evidence advanced that the adverse classification is erroneous. Dorothy Gussie Meyers, A-28559 (September 13, 1961).

The appellants have not shown by substantial, positive evidence that the adverse classification is erroneous. Mary Refugio Jackson et al; A-27236 etc. (February 29, 1956). Accordingly, the decisions are affirmed.

Each appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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Eugene M. Machado (Certified Mail)
Milton A. Padlina (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
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SACRAMENTO, CAL.
SEP 5 10 00 AM 1963
BUREAU OF
LAND MANAGEMENT

In reply refer to:
6.05c
Riverside 02582

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D.C. 20240

August 28, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Edwin C. Bernhardt : Desert Land Application
:
:

Decision Affirmed

Edwin C. Bernhardt has appealed from a decision, dated April 16, 1963, rejecting his desert land application identified above, for the reason that it is not proper to classify the applied for lands as suitable for desert land entry because the lands have a higher and better use for proposed townsite development and desert homesites than for agriculture. The decision sets forth that the lands offer potential homesite or recreation opportunities, also that disposition of the lands at public sale would provide a better administrative action than allowing such marginal lands to be developed under the agricultural land laws. In addition, the decision points out that the appellant has submitted no convincing evidence of the existence of adequate groundwater for successful reclamation of the applied for lands.

On appeal, Mr. Bernhardt submits self-serving statements of his proposed uses for the lands which appear to be related to agricultural research.

It is the purpose of the statutes governing desert land entries to encourage and promote the reclamation, by irrigation, of public lands which are arid or semi-arid in character (43 CFR 232.1), and every applicant for a desert land entry is required to file a declaration that he intends to reclaim the land he seeks. Reclamation of desert land is most fully demonstrated by irrigation of the land and the cultivation of crops.

The basic requirements for reclamation of a tract of land are to bring a sufficient quantity of water upon the land to irrigate it and to cultivate one-eighth of its surface. There has been no specification made as to what kind of a crop must be cultivated, the Department having held that the term "crop" would be any agricultural production which would provide a fair return for the expense of producing it. George W. Wilkinson, A-29315 (May 2, 1963), and the cases cited therein.

The appellant asserts he has been informed by some of the best geologists in the West that an adequate supply of water exists for the applied for land. However, the appellant has not supported his assertions on appeal by any substantial, positive evidence with respect to the existence of an adequate water supply for irrigation of the land from underground sources, and no convincing evidence has been supplied by the appellant which would dispute or refute the findings in the decision appealed from concerning the value of the land for townsite purposes and homesites, or its potential for recreational purposes or disposition under the public sale law.

In the circumstances, the application for desert land entry was properly disallowed and the decision appealed from is affirmed.

Edwin C. Bernhardt is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington D.C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Mr. Edwin C. Bernhardt (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
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SACRAMENTO, CAL.

SEP 25 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Riverside 02399

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C., 20240

September 18, 1963

Certified Mail
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DECISION

Thomas C. Corrigan : Desert Land Application

Decision Affirmed

Thomas C. Corrigan has appealed from a decision of the Riverside Land Office, dated May 1, 1963, rejecting his application for a desert land entry, describing 161.04 acres of land, for the reasons, among others, that:

1. The applicant has not shown he can obtain a water right from the responsible officials of the Imperial Irrigation District to irrigate the applied for land.

2. The accumulation of total salts, poor drainage, and an existing sewage contamination problem renders the lands unsuitable for agricultural production.

3. The Irrigation District refuses to issue a certificate of water availability because the District wishes to acquire the subject lands, along with other adjacent lands, for the purpose of protecting the bank and straightening the channel.

The appellant alleges that:

1. Similar lands in the same area are being improved into profitable farm land.

2. The Irrigation District will supply the required water.

Information in the case file is to the effect that the cultivated lands in the area occur on benches several feet above the flow of the river and, therefore, are protected from the overflow that causes the severe salt and sewage contamination in the subject land. Responsible officials of the Irrigation District reaffirmed that they will not issue a certificate of water availability to the applicant.

An application for desert land entry is properly rejected where the applicant fails to show that an adequate supply of irrigation water is available and the soil is considered to be unsuitable for agricultural development. Bernice B. Crooks et al., A-28698 (September 24, 1962); Dorothy Gussie Meyers, A-28559 (September 13, 1961).

Accordingly, the decision is affirmed.

Mr. Thomas C. Corrigan is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION

Thomas C. Corrigan (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
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SACRAMENTO, CAL.

NOV 12 10 00 AM 1963

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Riverside 02230, etc.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

October 2, 1963

DECISION

James L. Cannon et al. : Desert Land Applications

Decisions Affirmed

James L. Cannon and 5 others, listed in the attached appendix, have appealed from decisions by the Manager, Riverside Land Office, issued on December 4, 1962, wherein their respective desert land applications were held for rejection for the reason that the lands applied for are embraced within a first form reclamation withdrawal and are, therefore, not open to entry.

The record shows the subject lands to be within the Imperial Irrigation District. The lands have been subjected to the Smith Act of August 11, 1916 (43 U.S.C., 1958 ed., sec. 621 et seq.) and also included in a first form reclamation withdrawal on October 19, 1920, pursuant to section 3 of the Reclamation Act of June 17, 1902 (43 U.S.C., 1958 ed., sec. 416). The record further shows that the lands involved are still in a withdrawn status.

I. EFFECT OF SMITH ACT DESIGNATION ON FIRST FORM RECLAMATION WITHDRAWAL.

The first question presented is what effect does a designation under the act of August 11, 1916, supra, popularly known as the Smith Act, have on the allowance of applications under the public land laws for lands embraced in a first form reclamation withdrawal?

In 1954, the Department was called upon to rule on the above question and held the answer dependent upon which was effected first, the withdrawal or the Smith Act designation. Bill Fults, 61 I.D. 437 (1954). The Bill Fults case, however, proceeded under the mistaken assumption that there is a basic incompatibility between the Smith Act and a reclamation withdrawal and was expressly overruled by the Department in Elizabeth Holmes MacDonald et al., 69 I.D. 181 (1962), which held that unentered public land within an irrigation district which has been designated under the Smith Act may thereafter be included in a reclamation withdrawal, and when so withdrawn the land is not subject to entry under the desert land act. Therefore, under the MacDonald ruling the reclamation withdrawal is considered as being effective to bar entry under the Desert Land Act (43 U.S.C., 1958 ed., sec. 321 et seq.).

II. REQUEST BY APPELLANTS THAT LANDS BE RESTORED TO ENTRY.

Appellants' request that the Secretary of the Interior revoke the existing order of withdrawal as affecting the lands desired for entry and allow their subject applications.

The appeal arguments pertaining to this request are centered around paragraph 2, part (b), Article 23 of the written contract entered into by the Imperial Irrigation District and the Secretary of the Interior, dated December 1, 1932. The appropriate paragraph reads as follows:

> "Within a reasonable time, to be determined by the Secretary, from the date water is available for and can be delivered to any public lands within the boundaries of the district, such lands shall be opened to entry."

Appellants assert that the All-American Canal was completed in 1941, and since that time water has been available for delivery to the lands desired for entry; that the subject lands are not and have never been used or needed in the construction or maintenance of the All-American Canal; and that the reason for their withdrawal under the first form has ceased to exist.

The Secretary has determined that the reason for withdrawal of the lands in question, located in sections 1, 11, and 12, Township 17 South, Range 16 East, and section 1, Township 15 South, Range 12 East, S.B.M., California, still exists. The lands are needed for various right-of-way purposes or as a source of construction materials in connection with future work on the All-American Canal Project. Accordingly, appellants' request for revocation of the existing withdrawal is hereby denied.

The decisions appealed from are affirmed.

This decision constitutes the final determination of the Department in this matter. See 43 CFR 221.31.

Charles H. Stoddard

Director

Approved: November 1, 1963

Assistant Secretary of the Interior

DISTRIBUTION
Hon. Pat Martin, House of Representatives
James L. Cannon
Margaret Cannon
Donald Cannon
Jesse J. Campbell, Jr.
Herbert Swanson
Langston J. Goree
Joseph Schmitt, Attorney at Law
Division of Lands and Recreation
Bureau of Reclamation - Assistant Commissioner
Appeals List No. 1
BRA

APPENDIX

Appellant		Riverside
James L. Cannon	:	02230
Margaret Cannon	:	02231
Donald Cannon	:	02232
Jesse J. Campbell, Jr.	:	02233
Herbert Swanson	:	02280
Langston J. Goree	:	02367

appeal to Sec
set aside 2-3-64
A-30201

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SACRAMENTO, CAL.

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LAND MANAGEMENT
LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In Reply Refer to:
6.05c
Los Angeles 096387
096388

October 23, 1963

CERTIFIED MAIL
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DECISION

Elodymae Zwang Darrell Zwang	: : :	Desert Land Entries

Decision Affirmed as Modified

The above-named persons have appealed from a decision of the Riverside Land Office, dated April 3, 1963, rejecting their final proof and cancelling their entries as to those parts which exceed 80 acres. 320 acres were originally allowed in each desert land entry. The reasons for the partial cancellations of the entries are as follows:

1. The entries do not have a pumping plant of sufficient capacity to irrigate the 600 irrigable acres contained therein.

2. 10 gallons of water per minute per acre are required for the successful irrigation of similar lands in the area. A typical cropping plan would require planting a high consumptive use crop on four-fifths of the land (480 acres). Therefore, a minimum of 4,800 gallons of water per minute must be available to irrigate all the irrigable land in the entries.

3. The pump test indicates that the entrymen can produce a total of 1,284 gallons of water per minute with their present equipment. This amount of water, based upon a division into legal subdivisions, is sufficient to entitle them to a total of 160 acres (80 acres each).

The appellants allege as follows:

1. The true meaning of the regulation is not a requirement of enough water for all the irrigable land at one time, but rather, enough water to farm all the irrigable land as a sound economic unit using normal and accepted farming practices.

2. The 1,284 G.P.M. is adequate to begin the farm operations.

3. 1,284 G.P.M. totalled over the year, is sufficient to irrigate 600 acres.

4. The entrymen's well is 24 inches in diameter with a 16 inch casing and the maximum potential capacity of the well is in excess of 5,000 G.P.M.

The appellants submitted several affidavits to the effect that no farmer puts all his farm land under water at the same time. The appellants also request a hearing.

Departmental regulation 43 CFR 232.30 provides that:

> "x x x If pumping be relied upon as the means of irrigation, the plant installed for that purpose must be of sufficient capacity to render available enough water for all the irrigable land. x x x " (underlines added).

While it is generally true that farmers do not cultivate all their land at one time, nevertheless, a desert land entryman is required to have available, when needed, a sufficient water supply to irrigate, during the peak moisture period of the growing season, all the crops in a typical cropping plan, so that the crops will not die because of a lack of sufficient water.

The Department stated the rule as follows, in Dickinson v. Auerbach, 18 L.D. 16, 19 (1894):

> "x x x It is seldom that a farmer plants to crops, or otherwise cultivates, the whole body of his farm, and frugality and prudence demands the irrigation of that part only from which a harvest is expected. Good husbandry, however, as well as the law in the case of the desert land entryman, exact this potential irrigation." (underline added).

See also Gage v. Atwater et al., 21 L.D. 211, 216 (1895) which is to the same effect.

In view of the foregoing, it is not enough to have sufficient water to merely begin a farm operation. To be entitled to a patent to the land, the entryman must have presently available an adequate irrigation water supply.

There is no merit to the appellant's attempt to total the water supply for the year. The test is the amount of water that can be put to use during the peak of the growing season.

The maximum potential capacity of the appellant's well cannot be regarded as being in excess of 5,000 G.P.M. until the appellants have installed a pump and a motor that is capable of producing 5,000 G.P.M. This, the appellants must be prepared to demonstrate before they can earn the right to all the lands in their entries.

The evidence in the Bureau's records and the appellant's admission as to the capacity of their well are sufficient to resolve the issue in this case. Consequently, a hearing would serve no useful purpose and the request for such hearing is denied. Cf. Margaret A. Andrews et al., 64 I.D. 9 (1957).

Accordingly, the decision appealed from is affirmed as hereinafter modified.

When the decision becomes final the cases will be remanded to the Manager for the purpose of affording the entrymen an opportunity to file applications for extensions of time to complete making final proof in order that they can enlarge their well to irrigate all of the irrigable portion of the lands sought.

Elodymae and Darrell Zwang are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C., 20240. The filing fee will be computed on the basis of $5 for each entry included in the appeal. If the appeal covers both entries adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:
Ted R. Frame, Attorney at Law (Certified Mail)
Darrell and Elodymae Zwang (Regular Mail)
Hon. B. F. Sisk, House of Representatives, Washington, D. C.
Division of Lands and Recreation
Appeals List No. 1
MHS

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DEPT OF INTERIOR
SACRAMENTO, CAL.
NOV 26 10 09 AM 1963
BUREAU OF LAND MANAGEMENT
LAND OFFICE

In reply refer to:
6.05c
Riverside 02032

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

November 19, 1963

Certified Mail
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DECISION

Einar L. Hero : Desert Land Application

Decision Affirmed

The above-named party has appealed from a decision dated April 9, 1963, of the land office at Riverside, California, rejecting his above-identified desert land application.

The application was rejected for the reasons that (1) the lands are located in the Amargosa Valley at an elevation of about 2,500 feet and the rainfall averages less than 5 inches annually in the form of intense summer storms, (2) the valley is remote from existing or potential markets, and desert land entries previously allowed in the same valley, particularly on the Nevada side, have virtually failed except where they have been able to obtain cotton allotments or the like, (3) there is a long history of agricultural failures in similar valleys in Southern California, many of which are more suited for agriculture than Amargosa Valley, (4) existing economic data indicates that the area is not suitable for agricultural development, and (5) the refusal to classify the land in question is in conformity with the present land conservation program of the Department, which provides in pertinent part that lands which are marginal for agriculture will not be classified for entry under the public land agricultural development laws.

The appellant contends, in substance, that (1) while the 5 inches of rainfall is insufficient to produce grass, the land would require leveling, checking, subsoiling, treatment, and leaching, (2) adjoining sections have been entered and are being farmed by irrigation from wells having good production of water, (3) the land applied for is more suitable for farming than on the Nevada side, and has a better type of soil, (4) with modern transportation, the area is not considered remote from markets in Los Angeles, which is 250 miles from his present location, (5) there are many new methods of coping with agricultural problems, and land that was once considered to be worthless is now considered to be some of the best land in the State, (6) the Federal government is constructing power lines to supply power to pumps in the adjoining sections and throughout the area in general, (7) according to information furnished him by an employee of the Soil Conservation Service that with proper management the land can be made to produce satisfactory crops, and (8) the Bureau's assumption that the land is marginal is in error, and proper development of the land will make the land productive, valuable, taxable agricultural land. The appellant asserts, in conclusion, that he is not entering the land for speculation, but that in his present area taxes are higher than income derived from crops produced on the farming land, making it impossible to farm under those conditions, and, taxes, subdivisions, freeways, and nonagricultural residents are removing thousands of acres of the valley and most productive farm land.

We have carefully considered the allegations made by the appellant and have determined that he has not presented any positive or substantial evidence showing that the land in question is not marginal for agricultural development. The appellant states that in his present area taxes are higher than income derived from crops produced on the farming land. It would appear that the same situation could apply to the area in which the land applied for is located. Furthermore, the fact that the Federal government is extending power lines into the area involved does not necessarily mean that it was for the purpose of developing new lands, but is to supply the existing demand for electric power in the particular area. Since the appellant has presented no positive and substantial evidence that the adverse classification is in error, it was proper to reject his application. Cf. Dorothy Gussie Meyers, A-28559 (September 13, 1961).

Accordingly, the decision appealed from is affirmed.

Einar L. Hero is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION

Mr. Einar L. Hero (Certified Mail)
Division of Lands and Recreation
Appeals List No. 1
RBO

DOCKET FILE

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1963 DEC 18 AM 10 00

In reply refer to:
6.05c
Los Angeles 038283

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

December 12, 1963

DECISION

C. Donald Adams :
(Heir of John Q. Adams) :

Desert Land Entry

Decision Vacated

C. Donald Adams has appealed from a decision of the Riverside Land Office, dated June 11, 1963, cancelling the above-identified desert land entry for failure to submit final proof pursuant to the land office decision of February 13, 1963. [1]

The record shows that after the entry was allowed on February 11, 1909, the subject land came within the exterior boundaries of a First Form Reclamation Withdrawal on April 2, 1909. The entryman had complied with the annual proof requirements and on February 12, 1915, he was allowed an indeterminate extension of time under Section 5 of the act of June 27, 1906 (34 Stat. 520), because improvement of the land in the entry was being hindered by the reclamation withdrawal. The withdrawal was revoked on December 10, 1947, and the February 13 decision held that the statutory four-year period thereafter expired on October 19, 1951. The record also shows that on October 16, 1958, the entryman's heirs filed an application for relief under the provisions of the act of February 14, 1934 (48 Stat. 349). However, the February 13 decision held that the entryman's heirs were not entitled to the benefits of that act purportedly because 43 CFR 232.40(a) provides that the application must be filed prior to the time within which the applicant would otherwise be required to file final proof and the entry had expired on October 19, 1951.

The February 13 decision allowed the heirs 90 days in which to submit final proof or show cause why the entry should not be cancelled. The appellant took exception to these requirements because, among other things, he was not aware of the revocation of the reclamation withdrawal, he was not notified of the revocation, and he was entitled to be served with notice of such revocation.

The land office impliedly admitted that no notice of the revocation was sent to the heirs of the entryman. Nevertheless, the land office ruled in its June 11, 1963, decision that the act of June 27, 1906, does not require notice to be given of the revocation of the First Form Reclamation Withdrawal; that notice of the restoration of the land was published in the Federal Register on December 20, 1947; and that the Department has ruled that the publication of an Executive Order in the Federal Register is constructive notice to the public of the contents thereof, citing G. Scott Hammonds, A-29733 (March 20, 1963).

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[1] C. Donald Adams has filed the appeal on behalf of himself and other heirs of John Q. Adams.

The Hammonds decision, cited above, is not relevant to the issue in this case. The question in the Hammonds case, was whether the subsequent requirement to execute the stipulation containing the executive order published in the Federal Register in 1961 constituted a variance from the terms of the notice of sale, published in 1962. The Department held that the additional stipulation did not constitute a variance. However, the Comptroller General reversed the Department, holding that a notice of sale which does not contain the executive order, or which had not incorporated the executive order into the notice of sale by reference, did incorporate new conditions into the contract of the high bidder that had not been agreed to by him. The Comptroller General stated:

> ". . . It is hardly to be conceived that the order is automatically binding upon a bidder under an invitation which does not contain its provisions or a reference thereto. . . ." (Comptroller General's Opinion, B-151145 (June 17, 1963).

An appropriate departmental decision, Donald C. Ingersoll, 63 I.D. 397 (1956) holds, in effect, that:

> Publication in the Federal Register of an Executive Order is not necessarily notice to one who has an interest in the affected lands where the land office has a record of the name and address of the interested party.

Thus, the imputation of notice to the entryman in 1947 and the assumption that the entry expired in 1951 are erroneous. Consequently, the application, for relief under the act of February 14, 1934, is entitled to be considered on its merits.

Accordingly, the decisions of February 13 and June 11, 1963, are vacated and the case is remanded to the land office for further consideration.

Richard J McCormick

Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION
C. Donald Adams
Division of Lands and Recreation
Appeals List No. 1
MHS

DOCKET FILES

In reply refer to:
6.05c
Riverside 03309

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1964 MAY 18 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 11, 1964

DECISION

Gus Adamek, Jr. : Desert Land Application

Decision Vacated
Case Remanded

The above-named party has appealed from a decision of the land office at Riverside, California, dated July 26, 1963, rejecting his above-identified desert land application for the reason he failed to furnish sufficient evidence that he would be able to obtain water for irrigation from the Palo Verde Irrigation District within which the applied for land is located.

Subsequent to the issuance of the decision appealed from, the appellant furnished a certificate dated August 13, 1963 from the Palo Verde Irrigation District as evidence that he is entitled to obtain water from the District, and information to the same effect has been obtained by the land office from the Palo Verde Irrigation District. In view of these facts, and in accordance with the action taken by the Department in similar cases, Timotheus Quinett et al. A-29275 (August 19, 1963), the Manager has, requested that the case be remanded and suspended pending the outcome of proposed legislation now before Congress (H.R. 6218) relative to the Palo Verde Irrigation District.

Accordingly, the decision appealed from is hereby vacated, and the case remanded to the Manager of the Riverside Land Office for appropriate action as is necessary in the circumstances.

Richard J McCormick
Chief, Branch of Land Appeals
Division of Appeals

DISTRIBUTION:
Mr. Gus Adamek, Jr.
Division of Lands and Recreation
Appeals List No. 1
RBO

DOCKET FILES
DOCKET CLERK

Desert Land Application: Classification 2410.0-6

> Where lands are classified as unsuitable for desert land entry because of poor soil conditions, unfavorable topography and excessive reclamation costs the classification will not be disturbed in the absence of positive, substantial evidence that the classification is in error.

Casey M. Mostrong, Riverside 03015 (June 26, 1964)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 JUL 6 AM 11 22

In reply refer to:
704
Riverside 03015

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

June 26, 1964

Certified Mail
Return Receipt Requested

DECISION

Casey M. Mostrong : Desert Land Application

Decision Affirmed

Casey M. Mostrong has appealed from a decision of the Riverside Land Office, dated June 28, 1963 rejecting his above-noted application for land situated in the Imperial Irrigation District. The application was rejected because (1) of poor soils and unfavorable topography, and unsuitable for irrigation development from a physical and economic consideration; (2) the cost of developing the land into a permanent agricultural operation comparable to successful farms in the area would be excessive, in fact, greater than fair market values of developed lands in the vicinity; (3) no adjacent similar lands are being farmed, and agricultural activities have been abandoned on patented entries in neighboring sections.

The record shows that a prior entry on subject land was closed May 16, 1960. The regulation 43 CFR 2253.7(a) (formerly 43 CFR 231.18), requires an applicant for land, within an approved irrigation district which (land) has previously been entered to show that he has paid all charges due to the district and that he has paid the proper district or county officer for the holder of any tax certificate, delinquency certificate, or other proper evidence of tax sale, the amount for which the land was sold at tax sale, together with the interest and penalties provided by law.

An additional reason given for the rejection of the appellant's application, was that he failed to submit the information required by the above cited regulations. 1/

The appellant contends, in substance, that the decision should be reversed because the regulation cited therein provides for a 30 day suspension of the application to give the applicant an opportunity to furnish evidence of a water right. As to the abandonment of agricultural operations on patented entries, the appellant relates various problems involved in perfecting the numerous entries, the dates patents were granted and argues, in substance, that the entries are not abandoned because some of the

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1/ The decision also noted that the applicant's statements on his application concerning his knowledge of subject land were not corroborated by two witnesses as required in 43 CFR 232.10. However, this requirement was revoked by Circular 2110, 28 F.R. 6077, June 14, 1963, therefore matters in the record pertaining to this requirement need not be considered.

entrymen are not farmers, some are holding the lands for investment, some of the lands are leased, in the soil bank, or lying fallow, and one entry, being mostly desert, looks abandoned. He alleges that the decision appealed from is based upon the ex parte report of the field examination containing mere opinions, conclusions, and purported facts obtained through hearsay, all of which is not legal evidence upon which rejection action may be taken without a hearing, and cites the case of Claude E. Crumb, 62 I.D. 99 (1955) to sustain his allegation. The appellant requests that the entire field report be stricken from the record on grounds that each official who participated in it lacked knowledge of law, accepted hearsay opinions as facts, and showed poor judgment.

The appellant submits the following documents relative to the issue to support his appeal:

(1) "Exhibit E," a letter from the Imperial Irrigation District to show that there are no unpaid assessments against subject land.

(2) "Exhibit I," a letter, soils map and capability description from the United States Department of Agriculture, Soil Conservation Service, purporting to show that the land is suitable for desert land entry.

(3) "Exhibit L," estimated cost of delivery gate structure from the Westside Main Canal.

(4) "Exhibit M," estimated cost of leveling subject land.

The suspension of the appellant's application until he submitted the required supplemental information would have served no useful purpose, since subject land is unsuitable for agricultural development. While patented entries in the area may not be abandoned, it is apparent from the appellant's assertions that agricultural operations on them are abandoned. With respect to the case of Claude E. Crumb, cited by the appellant, it is not applicable to the instant case, but instead relates to the cancellation of an already allowed entry, rather than a mere application for an entry. The subject land was examined by a qualified Bureau land examiner and there is no requirement that he must be a lawyer. Moreover, item 1 of the appellant's exhibits shows that $50 must be paid to clear assessments against subject land; item 2 shows that most of the land is Class IV with slowly permeable substrata and subject to accumulation of toxic salt concentrations, and the remaining land is Class II with limited moisture retention and subject to wind erosion; items 3 and 4 are not conclusive as to the total cost of irrigating and reclaiming the land.

The report of the field examination further shows that subject land lies west of and above the Westside Main Canal, in an area of undeveloped desert lands. The soils are marginal for agriculture, composed of stratified, silty and sandy alluvium, containing considerable salinity and subject to moderately severe wind and water erosion. The land is situated on a slope of 1½ percent, cut by many small erosion gullies, complicating a drainage protection. The Imperial Irrigation District considers drainage protection of paramount importance in the area. The District has constructed the deep, wide, Trifolium Storm Drain to protect their Westside Main Canal. This storm drain passes through the northeast corner of subject land. Any attempt to irrigate and reclaim the land would require bringing water from the canal, underneath the storm drain, and then pumping it to the southeast corner of the tract, 20 feet higher than the canal. The detailed estimated total development cost for the 35 irrigable acres of subject land is $870 per acre to establish a bona fide agricultural operation. Therefore, development of the land for agricultural purposes is not economically feasible.

The Bureau's conservation program for the public lands provides in pertinent part that lands which are marginal for agriculture will not be classified for entry under the agricultural development laws. In this connection, the Department has consistently held that an application for desert land entry is properly rejected upon a determination that the land sought is marginal in character for agricultural purposes due to unfavorable topography and poor soil conditions and there is no positive, substantial evidence advanced that the adverse classification is erroneous. Mary Refugio Jackson et al, A-27236 etc. (February 29, 1956); Dorothy Gussie Meyers, A-28559 (September 13, 1961).

The appellant has not shown by positive, substantial evidence that the classification is erroneous. Accordingly, the decision is affirmed.

Casey M. Mostrong is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J McCormick

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosure

DISTRIBUTION
Le Roy Thomas, Attorney for appellant (Certified Mail)
Casey M. Mostrong
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RLE

DOCKET FILES

Desert Land Entry: Generally--Desert Land Entry: Cancellation 2226.1-5

Where the statutory life of desert land entries has expired prior to the time of the promulgation of the Maggie L. Havens decision, it was improper to suspend such entries under this ruling made in such decision, and the entrymen, or their heir, will be allowed 60 days to file the third annual proof in connection with one entry where the record shows that such proof was not filed, and 90 days within which to file the final proofs in connection therewith, failing in which the entries will be canceled.

Claire L. Phillips Frick, Heir of Randall P. and Grace L. Phillips,
Los Angeles 038236 & 038257 (July 13, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 SEP 21 AM 10 00

In reply refer to:
704
Los Angeles 038236
038257

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

July 13, 1964

DECISION

Claire L. Phillips Frick, :
Heir of Randall P. and Grace L. : Desert Land Entries
Phillips :

Decisions Affirmed

Claire L. Phillips Frick, daughter and heir of Grace and Randall Phillips, deceased, has appealed from two separate decisions of January 23, 1963, holding that the above-identified desert land entries have expired and allowing 90 days in which to submit acceptable final proofs or show cause why the entries should not have been canceled.

The Grace Phillips decision states that the entry was allowed in 1907 and suspended from the date of its allowance to October 28, 1914 due to the resurvey of the township and, therefore, the life of the entry was extended to October 28, 1918. Thereafter, the entrywoman filed no requests for extension of time and no notice was sent to her requiring final proof. Prior to the issuance of the decision, Maggie L. Havens, A-5580 (October 11, 1923), the Land Office had taken no action to cancel the entry. Subsequently, action on the entry was suspended by the Land Office pursuant to the ruling in the Havens case and no further action was taken thereon until the Land Office issued the decision which is now the subject of this appeal.

The Land Office decision also states that Mrs. Phillips' entry had expired on October 28, 1918, and, consequently, the erroneous placing of this entry under the Havens' suspension had no effect upon the entry which had legally expired prior to the date of that decision.

The Randall Phillips decision states, in effect, that Mr. Phillips' entry was allowed on October 28, 1914; no applications for extension of time were either filed or granted; and therefore the four-year statutory period of the entry expired on October 28, 1918. The case record indicates that only two annual proofs[1] were filed and since the required annual expenditures were not made, the entry became subject to cancellation. However, the failure to submit the third annual proof was overlooked and the entry was inadvertently suspended by the Land Office under the ruling of the Havens' case.

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[1] The record shows that Mr. Phillips' desert land application was filed on March 2, 1908, the first annual proof was received on March 9, 1909, and the second annual proof was received on March 2, 1910. Mrs. Grace Phillips filed her first annual proof on August 28, 1908, her second annual proof was filed on August 12, 1909 and her third annual proof was filed on August 4, 1910.

The appellant contends on appeal, among other things, that (1) she is the sole surviving heir of Randall P. and Grace Phillips, (2) all rights to her mother's entry were acquired by her father upon her mother's death in 1928 and she acquired her father's rights upon his death on December 21, 1950, (3) Mr. and Mrs. Phillips engaged the same person at the same time to perform all of the annual work on both entries; therefore, since her mother's first annual work is recorded in 1908, it follows that her father's first annual work was also performed in 1908, (4) had the land office complied with the provisions of 43 CFR 232.22 and checked the records for the purpose of ascertaining whether all annual proofs due on pending desert land entries had been made and sent the required 60-day notice in 1918, when such notice was due, Mr. Phillips could have rectified the omission in the land office records, (5) the entrymen were the owners of operating agricultural projects in the early Los Angeles area and it can be rightfully stated that there was a genuine interest in reclaiming these entries for true agricultural purposes, (6) her mother and father had paid property taxes on the land in question from 1922 through 1928 when it was discovered that it was not necessary, (7) inquiries at the land office revealed that the entries were in good order but were under the so-called Maggie Havens' suspension, and (8) had proper notice been served and subsequent extensions of time requested and granted, the end result would have been the same as it is today, i.e., still under the Maggie Havens' suspension with no water available.

The appellant requests the right to make application for relief by purchase under the provisions of the Act of February 14, 1934 (43 U.S.C., sec. 339), and if this request is not granted, she further requests that the entries be reinstated, without prejudice, under the Maggie Havens' suspension.

Irrespective of the allegations made by the appellant, the statutory life of the entries terminated by operation of the law on October 28, 1918. Moreover, the entryman, Randall Phillips, failed to submit the third annual proof in connection with his entry, Los Angeles 038257, and this entry became subject to the 60-day expiration notice requiring him to submit such annual proof, as provided by the applicable regulation 43 CFR 2226.1-4(d), or suffer the cancellation of his entry. Both entrymen were required to file final proofs on or before the expiration date of their entries, no application for extension having been made or granted in connection therewith prior to the expiration date thereof. Since neither of the entrymen filed the final proof when required, they should have been allowed a 90-day period within which to file such final proof, or show cause why the entries should not be canceled as provided

DOCKET FILES

for by the applicable regulation, 43 CFR 2226.1-5(j), when the entry expired on October 28, 1918. Since the entries expired the appellant's request for relief by purchasing them under the Act of February 14, 1934, supra, cannot be granted at this late date.

The fact that the land office inadvertently suspended the entries under the ruling made in the case of Maggie Havens, supra, instead of notifying the entrymen of the expiration of the statutory life of their entries, does not serve to extend the life of the entries, nor does it extend the time that the entryman Randall Phillips was required to file his third annual proof. The entries expired by operation of the law almost five years prior to the promulgation of the Maggie Havens decision and the ruling made therein, and it could not possibly be applied to the subject cases. While it is recognized that quite a number of errors have been made in these cases stemming from the original oversight in failing to take action earlier by giving notice that the entries would be canceled because the annual and final proofs were not made within the time required unless good cause was shown why they should not be canceled, there is no reason why these errors should be perpetuated rather than corrected. See Adelheid E. Bosworth et al., A-29601 (November 4, 1963), and cases cited therein.

Accordingly, the decisions appealed from are affirmed.

Claire L. Phillips Frick is allowed 60 days from the date of this decision to show that the annual expenditures were made for the year October 28, 1916, to October 28, 1917, in connection with desert land entry Los Angeles 038257, in accordance with 43 CFR 2226.1-4(a), and 90 days from the date of this decision within which to file final proof in the Office of the Director, Bureau of Land Management, Washington, D. C. 20240, in connection with both entries, failing in which the entries will be canceled without further notice.

This decision constitutes a final administrative determination by the Department in this matter. 43 CFR 1844.1 (formerly 43 CFR 221.31).

Chief, Office of Appeals and Hearings

Approved: September 9, 1964

Secretary of the Interior

DISTRIBUTION:

Claire L. Phillips Frick
Division of L&M S&T (4)
Division of L&M PM (2)
Appeals List No. 1
MHS/RBO

appeal to Sec.
Vacated & Remanded
A-30372 1-21-66

DOCKET FILES

Desert Land Entry: Cancellation 2226.1-5

It is proper to cancel a desert land entry after the expiration of its statutory life or extensions thereof where the entryman failed to complete all of the reclamation as required within the life of the entry, notwithstanding that the entry was erroneously suspended under the ruling made in the case of Maggie L. Havens. When it is apparent at the end of the life of the entry that the necessary compliance with the law which will enable an entryman to submit acceptable final proof has not been accomplished, it is not necessary to allow the entryman 90 days as provided by the regulation 43 CFR 2226.1-5(j), within which to attempt the impossible.

Heirs of Arthur A. Allen, Los Angeles 039412 (September 16, 1964)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 SEP 21 AM 10 00

In reply refer to:
704
Los Angeles 039412
September 16, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Heirs of Arthur A. Allen, :
Elizabeth A. Stump : Desert Land Entry
Mary Anne Brown :

Decision Affirmed

Elizabeth A. Stump and Mary Anne Brown, heirs of Arthur A. Allen, deceased, to whom the above-identified desert land entry was allowed, have appealed from a decision of the land office at Riverside, California dated March 3, 1964, cancelling the entry.

The decision recites, among other things, that the entryman was granted two extensions of time to make final proof on the entry under the Act of March 28, 1908 (35 Stat. 52) and the Act of April 30, 1912 (37 Stat. 106), respectively, the last extension having expired on April 11, 1926. The decision also states that a 90 day expiration notice should have been sent to the entryman upon the expiration of the last extension of time, but such a notice was never served because the entry was erroneously considered to be suspended under the ruling made in the case of Maggie L. Havens, A-5580 (October 11, 1923). The reason given in the decision as to the entry having been erroneously suspended under the Havens ruling was that the entry could have been perfected at any time during its statutory life by the mere drilling of a well for a water supply and was not dependent upon water from any irrigation district; therefore, all of the necessary conditions to make the entry eligible for suspension under Havens are not present in this case. The decision also recites that when it is apparent at the end of the life of the entry that the necessary compliance with the law which will enable an entryman to submit final proof has not been accomplished, it is not necessary to allow the entryman 90 days as provided in regulation 43 CFR 2226.1-5(j), to attempt the impossible; and finally, since the entry expired on April 11, 1926, and the fact that there is no way in which it can be placed in good standing, the entry must be cancelled.

The appellants contend, in substance, that (1) their father would never have let the entry expire in 1926 if he had not been informed that it was suspended under the Havens ruling, (2) that their mother, Mrs. Frances B. Allen, who succeeded to the entry upon their father's death, inquired as to whether or not the entry was subject to relief under the Act of February 14, 1934, and was informed that the entry was not subject to relief as it was suspended by the "provisions" of the Havens case,

(3) that after their mother passed away in 1950, they themselves went to the land office, and were informed that the entry was governed by the Havens case and nothing could be done until the suspension was lifted and (4) that in the years 1951 and 1956, they were again informed that the entry was still suspended. The appellants further assert that in 1959 they were approached by the Coachella Valley Water District relative to its obtaining a right-of-way over the entry for a pipeline, but refused the right-of-way; and, they were later refused help by the Bureau of Reclamation to obtain Colorado River water for irrigation. The appellants conclude that had their father been notified within 90 days of the date of expiration of the entry /April 11, 1926/, he would not have at that point allowed the entry to expire.

The record shows that the entry was allowed April 11, 1916, and all three annual proofs were subsequently filed as required by the applicable desert land law and regulations thereunder. On April 6, 1920, the entryman filed an application for an extension of time within which to make final proof of reclamation of the entry. This application was rejected, subject to the right of appeal and hearing. A hearing was held in the matter, and as a result of the hearing, a three-year extension of time to April 11, 1923 was granted on the basis that the entryman would reclaim the land by sinking a well to obtain irrigation water. The entry was again extended for a three-year period to April 11, 1926, during which time the entryman failed to drill a well or to reclaim the land in the entry.

The basis of the decision appealed from is, in effect, that the entry should never have been suspended under the Havens ruling, as the entryman indicated that he would develop sufficient irrigation water by drilling a well to reclaim all of the irrigable portion of the land sought; therefore, the entry was not dependent upon water that might be provided at a future time by an irrigation district. Furthermore, the Havens case was unique and the suspension should have been applied only in those situations comparable to that existing in that case where the person specifically requested that the entry be suspended. There was no such request made by the entryman in the instant case, nor is there anything of record to indicate that the entryman himself was ever informed that the entry was suspended under the Havens ruling.

It is evident that errors have been made in this case stemming from the original oversight in failing to take action earlier giving notice that the entry would be canceled because final proof and payment were not made within the time required unless good cause was shown why it should not be canceled, and also from the apparently inadvertent suspension of the entry after its term had expired. Although these errors were made, this fact does not compel a perpetuation of the errors, rather than a correction of them. See Adelhied E. Bosworth et al., A-29601 (November 4, 1963), and case cited therein.

Upon careful consideration of the whole record in this case, it can only be concluded that the decision appealed from is correct in holding that the entry expired on April 11, 1926, and that there is no way that the entry can be revived or extended from that time, notwithstanding the fact that the Bureau may have indicated that the entry was suspended under the Havens ruling. The decision is also correct in holding that when it is apparent at the end of the life of an entry that the necessary compliance with the law which will enable an entryman to submit acceptable final proof has not been accomplished it is not necessary to allow the entryman 90 days as provided by the applicable regulation (43 CFR 2226.1-5(j) to attempt the impossible. James T. Fulton et al., A-28475 (December 5, 1960). See also the decision in the case of Bessie Brown et al., A-29100 (December 10, 1962).

Accordingly, the decision appealed from is affirmed.

Elizabeth A. Stump and Mary Anne Brown are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

John B. Piccolo
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mrs. Elizabeth A. Stump and Mrs. Mary Anne Brown (Certified Mail)
Division of L&M, S&T (4)
Division of L&M, FM (2)
Appeals List No. 1
RBO

DOCKET [illegible]

Los Angeles 038258

Heirs of Frank Hoogner

Approved October 16, 1964

Applications and Entries: Amendments

Where a desert land entryman discovers that the description of the land in his original entry, upon which he has placed certain improvements, has been changed by a resurvey of the land in the area, an application to amend his original entry to include the land upon which the improvements have been placed will be approved, there appearing no objection of record.

Desert Land Entry: Proof

Where a desert land entryman makes application to purchase the land in his entry pursuant to the last paragepph of section 5 of the Act of March 4, 1915 (43 U.S.C. 338), which application previously has been approved, it is improper to suspend the entry under the ruling made in the Maggie L. Eavens decision of October 11, 1923, and the entryman or his heirs will be allowed to perfect his entry under the 1915 act by submitting final proof in accordance therewith.

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1964 OCT 30 AM 10 00

In reply refer to:
704
Los Angeles 038258

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

September 22, 1964

DECISION

Heirs of Frank Hoogner : Desert Land Entry

Decision Affirmed as Modified

The heirs of Frank Hoogner have appealed from a decision dated April 2, 1963, allowing them 90 days within which to submit an acceptable final proof, or suffer the cancellation of the above-identified desert land entry.

The decision, in summarizing the history of the case, states that the entryman, Frank Hoogner, applied for and was granted relief under the last paragraph of section 5 of the Act of March 4, 1915 (43 U.S.C. 338) on July 27, 1915. Subsequent to that time the entry had been suspended by reason of a resurvey of the township in which the land is located, the new plat of which was filed on October 17, 1923. The case was later suspended on January 7, 1924, under the rule laid down in the Maggie L. Havens decision, A-5580 of October 11, 1923. The decision appealed from held that the Maggie L. Havens ruling does not apply to the instant case for the reason that the entryman elected to purchase the land in the entry under the 1915 act and, therefore, since the suspension of the entry because of the resurvey ended on October 17, 1923, the five-year life of the entry, as provided for by the 1915 act, ended on October 17, 1928, and the entryman should have been required to file final proof within the five-year life of the entry, and to pay the remainder of the purchase money as required under the relief act.

The appellant contends, in substance, that (1) the expiration notice issued by the land office is plainly erroneous in holding that Hoogner's application for relief expired on October 17, 1928, and there is no basis for finding that the period provided for by the Act of March 4, 1915, to perfect a desert land entry as a homestead entry, expired five years after the filing of the resurvey plat on October 17, 1923; (2) the expiration notice erroneously discounts the effect of the Department's suspension action on the subject entry, and there is no merit to the finding that the suspension of the entryman's application constituted an erroneous use of the ruling in the Maggie L. Havens case and this suspension cannot be ignored, (3) the case of Adelheid E. Bosworth, et al., Los Angeles 038662 (April 4, 1962), cited by the Manager in his decision, is plainly inapplicable to the case at hand, because the Department had never suspended any application in that case, and (4) the heirs of Frank Hoogner perfected title to the entry pursuant to the Act of March 4, 1929, as amended by the Act of February 14, 1934 (43 U.S.C. sec. 339), and in accordance with the suggestion made by the Bureau's land office, have submitted the requisite sums under that act.

A review of the records shows that the entryman also filed an application for the amendment of his desert land entry on the same date that he filed his application for relief under the 1915 act. The purpose of the amendment of the entry was to conform the entry to embrace the S$\frac{1}{2}$N$\frac{1}{2}$ and the N$\frac{1}{2}$S$\frac{1}{2}$, sec. 13, T. 14 S., R. 10 E., SBM, in accordance with the plat of resurvey approved October 17, 1923, instead of the SE$\frac{1}{4}$ sec. 13, T. 14 S., R. 10 E., and the SW$\frac{1}{4}$ sec. 18, T. 14 S., R. 11 E., SBM, as originally entered. Action on the application to amend was also suspended pending completion of the resurvey, and no final action has been taken on this application. The records show also that the heirs of the entryman have, in fact, filed an application to purchase the entry under the Act of March 4, 1929 (45 Stat. 1548), as amended by the Act of February 14, 1934 (43 U.S.C. 339), and have paid the initial payment of 25 cents an acre, and the final payment of 75 cents per acre purchase money. No final action has been taken by the land office in connection with this application.

The lands involved are included within a first form reclamation withdrawal and are under the jurisdiction of the Bureau of Reclamation, United States Department of the Interior.

The conclusion reached in the decision appealed from is correct to the extent that this case should not have been suspended under the Maggie L. Havens ruling, because the entryman had made application for relief under the 1915 act, which application had been allowed, and the entryman should have been required to perfect the entry under that act. It was so held in the case of Adelheid E. Bosworth et al., A-29601 (November 4, 1963), which affirmed the Bureau decision of April 4, 1962, in the same case, and referred to by the appellants in their appeal. Accordingly, the heirs of the entryman will be permitted to perfect the entry under the 1915 act.

The Bureau of Reclamation has indicated that allowance of the application for amendment of the entry will not interfere with any of its programs. Therefore, in the absence of any objections thereto, the application to amend the entry as mentioned above, is hereby approved.

Since the final payment of 75 cents per acre, paid in connection with the application for purchase under the Act of February 14, 1934, is the same as that required under the 1915 act, this amount may be applied to the purchase price of the land in the entry under the 1915 act. See 43 CFR 2226.2-7(o). The application to purchase the land under the act of 1934 is rejected. The initial payment of 25 cents per acre under the 1934 act application will be refunded by the land office.

To perfect an entry by purchase under the last paragraph of Section 5 of the act of March 4, 1915, supra, it is provided that the entryman shall file final proof showing that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than $1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years. It is our opinion that the entryman, and his heirs have submitted sufficient evidence to show that these requirements for filing final proof have been met or at least substantially so. In fact the land office records show that the entryman filed all three annual proofs required in connection with the entry, wherein he shows that he has expended the amount of over $3 per acre in leveling, clearing, and ditching the land for irrigation. Evidence has been submitted by the appellants showing that one of the heirs continued to maintain the land in the entry in a suitable state for agricultural development until his own demise. However, as a formality, it is necessary for the heirs to publish notice of their intention to submit final proof in this case as is required in other ordinary homestead and desert land cases. The final proof may be made before the qualified officer named in the notice of intention, or it may be taken before the Manager of the Riverside Land Office. Special forms will be furnished by the land office for making final proof in this case. See 43 CFR 2226.1-5 and 2226.2-7(g)(o) and (r) (April 1, 1964, Supp.).

Accordingly, the appellants are allowed 90 days from the date of approval of thi decision within which to file final proof as required by the applicable law and regulations in the Riverside Land Office, failing in which the entry will be cancelled without further notice. If final proof is submitted as required, final certificate and patent will then be issued to the entry in the name of the Estate of Frank Hoogner.

The decision appealed from is, therefore, affirmed as herein modified.

The decision constitutes a final determination by the Department in this matter. 43 CFR 1844.1.

James F. Doyle
Chief, Office of Appeals
and Hearings

Approved: October 16, 1964

Assistant Secretary of the Interior

DISTRIBUTION:

Mr. Stuart J. Land, Attorney for Appellants
Heirs of Frank Hoogner
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

Los Angeles 0104862

Frances Sarno

Approved November 16, 1964

Desert Land Entry: Classification

A desert land application is properly rejected when, during the course of processing the application, the Department classifies a large area of land, including the tract applied for, as unsuitable for agricultural development.

DOCKET FILES

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1964 DEC 2 AM 10 00

In reply refer to:
704
Los Angeles 0104862

October 27, 1964

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

Frances Sarno : Desert Land Application

Decision Affirmed

Frances Sarno has appealed from a decision of the Riverside Land Office, dated July 21, 1964, rejecting her above-identified desert land application as to the SW¼ sec. 14, T. 32 S., R. 28 E., M.D.M., for the reason that all of the public lands in such township are classified for non-agricultural use under the public land laws.[1]

On appeal Mrs. Sarno asserts, in substance, that the agricultural potential of the land sought is dependent upon water and the ability of an applicant to finance the cost of obtaining it; that she and her husband are financially able to prepare the land for crop production. She asserts further that the history of the area shows the soil to be suitable for agriculture. She states that successful wells have been drilled in surrounding lands and that it is believed a large lake underlies the area. However, the appellant has not submitted any corroborative evidence to support these assertions.

Bureau records confirm that certain public lands in California, including all of the public lands in the township wherein the applied for land is located, were classified as unsuitable for agricultural development under any of the applicable land laws by the Director of this Bureau in a decision Frances Elizabeth Cain et al., Los Angeles 0145092, etc., and Nick P. Leko et al., Los Angeles 0151065, etc., of March 11, 1960, approved by the Assistant Secretary of the Interior on March 21, 1960. Notice of the classification action was published in the Federal Register on April 22, 1960.

The decision of March 11, 1960, supplemented two earlier Bureau decisions, approved by the Assistant Secretary on June 24, 1959. The two decisions (bearing the same names and serial numbers as the decision of March 11, 1960) set forth in detail the reasons for the adverse classification of the lands.

---

[1] The appellant's application, which was filed on May 26, 1953, was rejected previously as to a portion of the applied for lands (SE¼ sec. 14) and the case is closed as to such land.

The notice published in the Federal Register stated that the classification, which has been in effect since March 21, 1960, was based upon investigations and studies of the lands which resulted in a determination that water of a proper quality and of sufficient quantity as would be required for irrigated crop production is not available and that irrigation development of some of the lands is not feasible by any practical means. The notice also indicated that all pending agricultural applications would be rejected and applications thereafter submitted for any of the public lands involved would not be accepted for filing but would be returned to the applicants accompanied with a notice of the adverse classification, and that no right of appeal lies from the refusal to accept such applications for filing.

In the circumstances, the appellant's application was properly rejected and the decision appealed from is affirmed.

This decision constitutes the final administrative determination by the Department in this matter. 43 CFR 1844.1.

James F. Doyle
Chief, Office of Appeals
and Hearings

Approved: November 16, 1964

John A. Carver Jr.
Assistant Secretary of the Interior

DISTRIBUTION:

Mrs. Frances Sarno
Div. of L&M S&T (4)
Div. of L&M PM (2)
Docket & Records Section, Solicitor's Office (2)
Staff Assistant to Assistant Secretary, PLM
Assistant Solicitor, Land Appeals
Appeals List No. 1
MAG

appeal to Sec
Remanded A-30471
4-21-66

DOCKET FILES

Desert Land Entries: Cancellation 2226.1-5

Where it is established that a single well upon which two adjoining desert land entries are dependent for irrigation water, at the time of final proof produces only enough water to irrigate a certain area comprising a quarter section of the one entry, that entry will be approved for patent for that portion, and cancelled as to the remainder. The other entry for which there is no water available will be cancelled in its entirety.

United States of America v. Bernadine K. Lyttle et al., Los Angeles 096383 and 096386 (March 10, 1965)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 MAR 29 AM 10 00

In reply refer to:
704
Los Angeles Contest Nos.
096383, 096386

March 10, 1965

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

DECISION

United States of America, :
Contestant :

v. : Involving Desert Land Entries Los Angeles 096383 and 096386

Bernadine K. Lyttle, :
Individually and as
Administratrix of the :
Estate of Joseph C. Lyttle,
Contestee :

Decision Affirmed in Part
Reversed in Part

The above named Contestant and Contestee have each appealed from a decision of the Hearing Examiner dated July 22, 1964, cancelling the above-identified desert land entries in part.

The contest complaint filed against the entry, Los Angeles 096386, of Mrs. Bernadine K. Lyttle, embracing the N½ sec. 30, T. 4 S., R. 16 E., S. B. M., California, alleged essentially as follows:

> "5 (a) The water supply developed for the entry is insufficient for the irrigation of all of the irrigable portion of the land embraced in the entry, specifically the NE¼ of said section 30."

The contest complaint filed against the entry, Los Angeles 096383, of Joseph C. Lyttle, who has passed away since filing final proof and prior to the hearing, embracing the S½ sec. 30, T. 4 S., R. 16 E., alleged essentially as follows:

> "5(a) No water has been developed for the entry.
>
> (b) An irrigation system adequate to irrigate all of the irrigable land in the entry has not been constructed."

A hearing was held on March 3, 1964, the United States through the Bureau of Land Management being represented by the Regional Solicitor, Los Angeles, California, and the Contestee being represented by an attorney. At the outset of the hearing it was stipulated between the parties that the two contests be consolidated for the hearing, and that the complaint filed in

Contest No. 096386 be amended to include allegation number 5(b) as set forth in the complaint filed in Contest No. 096383.

The Hearing Examiner before whom the hearing was held, found that the Contestee has an existing uncontroverted water supply of 1400 g.p.m.; that the use of 7.2 g.p.m. per acre of this available water supply when applied to winter crops, is sufficient to bring to maturity 194 acres of such crops on the entries; and, that the use of 9.5 g.p.m. of the available water supply on summer grain, grass forage, or vegetable crops, is sufficient to bring to maturity 147 acres of summer crops on the entries, the existing water being adequate to irrigate a total of 341 acres of crops in any given twelve months period; and, that in addition to the 341 acres, the entrymen are entitled to 19 acres for the construction of roads, buildings, etc., making a total of 360 acres. The Hearing Examiner also found that the greater weight of evidence produced at the hearing clearly indicates that the ditches constructed on the entries were adequate to carry the water produced at the well to every portion of the entries. The Hearing Examiner's findings are substantially summarized in his decision of July 22, 1964, and will not be repeated in detail here.

In conclusion, the Hearing Examiner canceled entry, Los Angeles 096386, as to the $E\frac{1}{2}NE\frac{1}{4}$ sec. 30 (80 acres); canceled entry, Los Angeles 096383 as to the $SE\frac{1}{4}$ and the $SE\frac{1}{4}SW\frac{1}{4}$ sec. 30 (200 acres); and, dismissed the allegation 5(b) as set forth in each contest complaint.

In its appeal the Contestant contends, in substance, that taking an irrigation efficiency of 44 percent (which is the average between the 58 percent efficiency admitted by Robert E. Anderson, one of the Contestee's witnesses, and the 30 percent efficiency estimated by the Government's witness), the entrywoman would be required to pump 15.0 g.p.m. of water per acre to meet the 6.6 g.p.m. plant peak moisture required for alfalfa, grapes and citrus; that at this rate the 1400 g.p.m. of water available would be sufficient to irrigate 95 acres of alfalfa, grapes, or citrus, or any other comparable high water consumption crops during the summer; assuming the same irrigation efficiency, the entrywoman would be required to pump approximately 13.0 g.p.m. per acre to meet the 5.7 g.p.m. per acre plant peak moisture use requirement for grain and vegetables; at this rate the entrywoman, with 1400 g.p.m. of water available could irrigate no more than 110 acres of grain or vegetables or any other comparable low water consumption crop during the winter growing season. The Contestant also contends that the open earth unlined ditches do not meet the requirement for permanently constructed main and lateral ditches, therefore, there is no basis for dismissing allegation 5(b) in either of the complaints involved. The Contestant concludes that in accordance with its calculations, the water supply developed is sufficient to irrigate only 110 acres of the land in the two entries; and the land office has already approved the entrywoman's final proof as to 160 acres of land in Los Angeles 096386. On the basis of its contentions, the Contestant requests that the decision appealed from be reversed and set aside; the Director find that none of the land in the entries has been reclaimed in a manner contemplated by the desert land law and the regulations thereunder; and, a decision be issued cancelling desert land entry, Los Angeles 096386 as to the NE$\frac{1}{4}$ sec. 30, and cancelling entry Los Angeles 096383 in its entirety.

In her appeal, the Contestee contends, among other things, that throughout the contest proceedings the Contestant has sought to impose upon her arbitrary, unreasonable, and highly unrealistic requirements; Contestant's two basic assumptions in computing water requirements on the basis that the subject area would be so-called "high" desert such as the Mojave River Basin of California, and that the crop would be alfalfa for hay, are unsound; the growing season of Chuckwalla Valley, a "low" desert, in which the subject entries are located, is year-round, and the crops proposed to be grown by her, are found to be feasible by each of the experienced farmers who testified as witnesses in regard thereto; the Hearing Examiner's decision is correct in holding that it is feasible to plant winter crops on one portion of the entry and summer crops on another portion, thus utilizing the existing water supply over most of any given twelve month period; and, the desert land law and the departmental regulations do not require an optimum water supply. The Contestee claims that the water distribution system on the entries is adequate. The Contestee also asserts that the Hearing Examiner's finding that sufficient water has been developed to irrigate only 341 acres of the entries limiting the acres to be allowed (with 19 acres for roads, etc.,) to 360 acres is against the preponderance of evidence; and, that based on the testimony presented by her witnesses, the 1400 g.p.m. produced from the well on her entry, Los Angeles 096386, is sufficient to develop a full 640-acre section of land. The Contestee concludes that the facts, law and equities, compel an allowance of patent on both entries in their entireties.

The records show that the final proofs were filed in connection with both entries on March 7, 1961. The final proofs indicate that 40 acres in each of the entries were planted to barley and were being irrigated at the time of proof. This has not been disputed. The final proofs, and the evidence presented at the hearing, also show that the entrymen had constructed main canals and lateral ditches so that water could be conveyed to each legal subdivision in the entries. Although the canals and ditches are unlined and uncompacted, we do not agree with the Contestant that they are inadequate to carry the water produced by the well on the Contestee's entry. Nor do we agree with the Contestant's allegation that none of the land in the entries has been reclaimed as provided for by the applicable law and regulations. In fact the willingness of the Contestant to allow 160 acres of the land in entry, Los Angeles 096386, to go to patent, negates these very allegations. We concur with the Hearing Examiner that the required canals and ditches had been constructed on the entries, and with his dismissal of the allegation 5(b) as set forth in each contest complaint.

Thus we find that the entrymen, at the time of final proof, had one-eighth of the entries under cultivation, and the required permanent canals and ditches constructed thereby complying with the regulations then in effect, 43 CFR 232.30 (now 43 CFR 2226.1-5(f)) to this extent.

There appears to be a considerable difference of opinion, however, as to the amount of land that can be irrigated from the available supply of 1400 g.p.m. produced by the well on the Contestee's entry. We agree with the Hearing Examiner's statement that "it is impossible to arrive at an unimpeachable determination of the exact number of acres on which a reasonably good crop can be brought to maturity with the existing water supply", because of the many elements which affect the amount needed, or which can be made available for plant consumption. However, we do not agree with the Contestee that there is sufficient water available to produce crops on all of the 640 acres embraced in both entries under consideration, nor do we agree with the Contestant that the maximum amount of water available will produce crops on only 110 acres of the entries.

In this respect it has been the position of the Bureau of Land Management, that 9 g.p.m. of water per acre is required to produce a reasonably good crop, during the usual, regular growing season, in areas similar to the one under consideration here. See United States v. Josephine C. Bender, California Contest No. 6915 (Los Angeles 092178) (March 7, 1963); United States v. Alberta Hill Swallow et al., California Contest Nos. 6914 etc. (Los Angeles 086967 etc.) (March 7, 1963). In these cases the basic rate of 9 g.p.m. was confined to the typical crops being produced in the areas in question, during the usual, regular growing season, and not those which might be produced over a twelve month period. 1/ While some barley and milo are grown in the area, the typical summer crops being successfully grown are alfalfa, grapes, and citrus. The latter three crops require approximately the same amount of water to bring them to maturity. Thus, taking into consideration the type of soil and climatic conditions in the area in question, the rate of 9.5 g.p.m. per acre for the production of summer crops of the type mentioned, as suggested by the Hearing Examiner, would appear to be more nearly the correct amount of water required. There was no evidence produced, however, to show that winter crops have been or can be grown in the area, or that crops can be grown in any given twelve months period on the entries.

1/ While the desert land law and the regulations thereunder do not specify what kind of agricultural crops may be grown on a desert land entry, such crops are usually considered to be those which the country and the climate in the region of the land are generally adapted. Cf. Babcock v. Watson et al., 2 L.D. 19 (1883).

Therefore, giving the Contestee the benefit of the maximum amount of water of 1400 g.p.m. that may be produced from the well on her entry, and using the basic rate of 9.5 g.p.m. per acre would allow the Contestee to successfully irrigate and reclaim at least 147 acres. The 147 acres, with 13 acres for the construction of roads, ditches, etc., making a total of 160 acres should be patented to the Contestee. As the Contestee's well and other improvements are located in the NW¼ sec. 30, T. 4 S., R. 16 E., SBM, embraced in her entry, Los Angeles 096386, a patent should be issued for the land described therein. 2/ To this extent we are in agreement with the Contestant.

Therefore, the entry of the Contestee, Mrs. Bernadine K. Lyttle, Los Angeles 096386, is canceled as to the NE¼ sec. 30, and the entry Los Angeles 096383, is cancelled in its entirety.

Accordingly, the decision of the Hearing Examiner is affirmed in part and reversed in part as provided herein.

The Contestee, Mrs. Bernadine K. Lyttle, is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each entry included in the appeal. If the appeal covers both entries adversely affected by this decision the total filing fee will be $10. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence wherein the decision appealed from is in error.

In the event of an appeal, the adverse party to be served by Mr. Lyttle is:

Regional Solicitor
U. S. Department of the Interior
1020 Rowan Building
458 South Spring Street
Los Angeles, California

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures

2/ The NW¼ sec. 30, T. 4 S., R. 16 E., SBM, is comprised of and described as Lots 1 and 2 of the NW¼, containing 160 acres.

DISTRIBUTION

Mr. Ted R. Frame, Attorney for Contestee (Certified Mail)
Mrs. Bernadine K. Lyttle
Regional Solicitor, Los Angeles, California
Rudolph M. Steiner, Hearing Examiner
Hearings Administrative Assistant
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

DOCKET FILES

Desert Land Entry: Assignments 2226.1-2

Approval of a partial assignment of a desert land entry is properly denied, where the entry is comprised of an odd-shaped parcel of land identified by a tract number only and cannot be subdivided without benefit of a supplemental plat of survey.

Surveys of Public Lands: Generally 9180

Approval of a partial assignment of a desert land entry is properly denied, where the entry is comprised of an odd-shaped parcel of land identified by a tract number only and cannot be subdivided without benefit of a supplemental plat of survey.

Elwin H. Hanna, Riverside 06210 (April 1, 1965)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 APR 8 PM 2 27

In reply refer to:
704
Riverside 06210
Los Angeles 084364

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

April 1, 1965

Certified Mail
Return Receipt Requested

DECISION

Mary Elizabeth Anderson, :
Assignor :
: Desert Land Entry
Elwin H. Hanna, :
Assignee :

Decision Affirmed

Elwin H. Hanna has appealed from a decision of the Riverside District and Land Office, dated February 4, 1965, denying approval of a partial assignment to him of desert land entry, Los Angeles 084364. The partial assignment, identified as Riverside 06210, is based upon a quitclaim deed executed by Mary Elizabeth Anderson, present holder of the entry, conveying the $W\frac{1}{2}NE\frac{1}{4}$ of Tract 113, sec. 18, T. 7 S., R. 22 E., S.B.M., California, to Mr. Hanna. The reason given for denying approval of the partial assignment was that Tract 113 is an odd-shaped parcel of land comprising 327.05 acres, and cannot be subdivided without benefit of a supplemental plat of survey.

The appellant alleges that:

1. "The manner in which the description of this said parcel of land was written in the original decision to Dorothy C. Elam, July 3, 1950, stated that this particular parcel of land, containing 80 acres, was the . $W\frac{1}{2}NE\frac{1}{4}$ of Section 18, T. 7 S., R. 22 E., SBM, California and, therefore two legal subdivisions of 40 acres each."

2. He owns the adjoining land and it would be advantageous to him to add the land sought to his land.

The appellant requests that he be permitted "to survey said 80 acres" and that the assignment be allowed.

There is nothing in the case file which supports the appellant's allegation that the assigned land was described in 1950 as the $W\frac{1}{2}NE\frac{1}{4}$ or as two legal subdivisions of 40 acres each. The record shows that from the very beginning, desert land entry Los Angeles 084364 was described as "Tract 113". A description by legal subdivisions was added in parenthesis, after "Tract 113", but these were surplusage and they did not constitute a legal identification of the land in the entry.

The original survey plat of October 6, 1856, shows that the W$\frac{1}{2}$ of sec. 18, T. 7 S., R. 22 E., S.B.M. was surveyed by legal subdivisions, and in this survey, the E$\frac{1}{2}$W$\frac{1}{2}$ of the section is shown to contain 160 acres. The independent resurvey plat of December 16, 1919 and the supplemental plat of April 1, 1918 show that the location of the northeast and the southeast section corners and the location of the quarter corners on the north and the south section lines of section 18 were changed. As a result of these changes, the land in the eastern half of section 18 no longer corresponds with the 160 acres of land originally described in the 1856 survey plat and "Tract 113" cannot be described by legal subdivisions. Consequently, the District and Land Office was correct in its ruling that an 80 acre tract, the tract of land proposed to be identified as the W$\frac{1}{2}$NE$\frac{1}{4}$, cannot be segregated from Tract 113 by legal subdivision without a supplemental plat of survey.

The Bureau of Land Management is not authorized to allow private non-mineral surveys of the public lands. See departmental regulation 43 CFR 9180.0-3(a). Therefore, the appellant's request for permission to survey the subject land must be denied.

Accordingly, the decision is affirmed.

Elwin H. Hanna is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals and Hearings

Enclosure

DISTRIBUTION:
Elwin H. Hanna (Certified Mail)
Mary Elizabeth Anderson
Division of Engineering
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
MHS

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 MAY 24 AM 10 00

Los Angeles 0153844

Woodrow C. Stingley

Approved May 7, 1965

Desert Land Entry: Application

The mere filing of an application for a desert land entry does not create any present right or interest in the land in the applicant but only the right to have the application considered.

Desert Land Entry: Classification

It is proper to refuse to classify land for disposal under the desert land law, where the land has been classified (without opening) for small tract purposes, and it has been determined that the land, because of its location, has a high potential for commercial purposes, and such uses would be more in the public interest than disposing of the land for agricultural development. It is also proper to refuse to classify land within the Palo Verde Irrigation District for disposition under the desert land law where favorable classification would, contrary to the public interest, increase the pressure on the inadequate water supply available for use in California from the Colorado River, notwithstanding that the applicant indicates the possibility of developing irrigation water from underground sources.

In reply refer to:
704
Los Angeles 0153844

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

April 27, 1965

DECISION

Woodrow C. Stingley : Desert Land Application
:
:

Decision Affirmed as Modified

Woodrow C. Stingley has appealed from a decision of the Riverside District and Land Office, dated February 3, 1965, rejecting his above-identified desert land application for the reasons that (1) the land remaining after the exclusion of the land within the approved highway right-of-way, has a higher and better use for commercial development in connection with a proposed freeway, than for desert land entry purposes, and (2) the lands remaining after the freeway right-of-way is carved out, are less than the minimum acreage considered to comprise an economic agricultural unit in the general area under consideration.

The decision recites that the subject application was first rejected by land office decision of January 24, 1963, but on the eventual appeal to the Secretary of the Interior the case was remanded by decision, A-29275 of August 19, 1963, with the directive that the application should be allowed provided that the special relief legislation, HR 6218, was enacted to extend the statutory time limit to make final proof on the entries in the Lower Palo Verde Mesa area, and that the land applied for otherwise qualifies for desert land entry. The decision also recites that the records show that the subject land was classified for small tract purposes (without opening) by Classification Order No. 629 of October 7, 1960. The classification provides that the lands are segregated from all forms of appropriation under the public land laws. Consequently, the subject application should have been rejected at the time of this classification. The rejection of January 24, 1963, referred to above, dwelt primarily on the issue of suitability of the land for desert land entry in the technical agricultural sense. Similarly, the Secretarial decision of August 19, 1963 stressed the feasability of agricultural development based on the availability of a water supply for irrigation purposes.

On appeal, the appellant contends, in substance, that (1) no legal reasons are given for the rejection, but is limited to the opinions, unsupported by facts, that the land has a higher and better use for commercial purposes, and is too small to be an economic unit, (2) the factual basis of the decision is not given, i.e.; the number of acres, the basis of the economic unit and the commercial value are not given, but only conclusions, which are stated in unsatisfactory terms, (3) the decision is erroneous in its conclusion, as there is no "commercial use" of the thousands of other acres available; there is a practical use for the land for citrus, and it is economically feasible for that use, (4) similarly situated land has been subject to entry, no tenable distinction between this land and adjacent desert land entries has been or is possible, (5) the land is not needed for commercial uses as thousands of acres are available and unused on each side of the highway for many miles on each side of this site; it has always been at an intersection and fronted on a highway, and its commercial possibilities will be decreased when the highway becomes a freeway, (6) he should not forfeit his right due to matters which have arisen entirely because of long administrative delay, the highway was not planned when his application was filed, it still is not entirely determined and will not be built for several years, and (7) the rejection of the application was reversed on appeal, and it should not again be rejected on new grounds, and also opinions five years later. The appellant has submitted an analysis of a 40-acre parcel of citrus (naval oranges) purporting to show that 40 acres can produce a profit in excess of $45,000.

It should be noted at the outset that the appellant does not have an allowed entry on the land, but only an application for the land. It has been well established that the filing of an application for public land does not create any present right or title in the land in the applicant, but only a right to have the application considered. Cf. Everett H. Adkins, A-28245 (May 23, 1960).

It is true that the previous rejection of the subject application was vacated and the case remanded for consideration and allowance provided HR 6218 was enacted into law, and provided that the land applied for otherwise qualifies for desert land entry.

After carefully reviewing the record in this case, including the appeal submitted by the appellant, we can only conclude that the use of the land for small tract purposes for which it is presently classified and its high potential for commercial purposes by reason of its location would constitute a higher use and be more in the public interest than disposing of the land for agricultural development. In this respect it has been well established that under the discretionary authority vested in him by section 7 of the Taylor Grazing Act (43 U.S.C., 1958 ed., s 315f), the Secretary of the Interior may properly consider and weigh all factors which have a bearing on the suitability of the land for use or disposal including the effect on the public interest. Nelson A. Gerttula v. Stewart L. Udall, 309 F. 2d 653 (1962).

Moreover, while it is true that HR 6218 has been enacted into law as Public Law 88-645 (78 Stat. 1062), and that in its letter decision of August 19, 1963, the Department instructed that the appellant's application should be allowed, allowance of the application in contemplation of this act, would require the use of Colorado River water for irrigation. In a recent departmental decision, Hugh S. Ritter, Thomas M. Bunn, A-30415 (February 24, 1965) relative to the use of Colorado River water in connection with applications for desert land entries in the Imperial Valley in California, it was stated:

> "California is presently using more than 5,100,000 acre feet of Colorado River water annually. This use substantially exceeds the 4,400,000 acre feet of annual consumptive use which is California's entitlement under Arizona v. California, 373 U.S. 546 (1963), when a total of 7,500,000 acre feet of Colorado River water is available for consumptive use in the lower Colorado River basin States of Arizona, California, and Nevada. Present California agricultural uses of Colorado River water crowd or exceed the 3,850,000 acre feet total of the first three priorities under the seven party California Colorado River water agreement.
>
> Nor can the continued availability of 7,500,00 acre feet of mainstream water for consumptive use in the lower basin be anticipated. On the contrary, the Department estimates an assured availability of less than 7,500,000 acre feet by 1975 unless there is extensive salvage of water now lost in and along the lower river itself. Even with such salvage, mainstream water available to the lower basin will, it estimates, fall to 7,725,000 acre feet per annum by 1975, and decline to 7,155,000 and 6,680,000 acre feet per annum by 1990 and 2000, respectively. See Table 16A, Page IV-13, Pacific Southwest Water Plan Report, Department of the Interior, January 1964. The Chief Engineer of the Colorado River Board of California predicts even greater deficiencies. For 1970, he predicts an availability of only 7,000,000 acre feet per annum. For 1990, only 5,900,000 acre feet per annum.
>
> In these circumstances, it would be contrary to the public interest at this time to increase the pressure on the inadequate water supply available for use in California from the Colorado River by classifying the lands involved in these applications and other similar public lands as available for disposition under the desert land law."

For the same reasons, the Department determined in the case of Stephen H. Clarkson, A-30438 (March 25, 1965), that it would not be in the best interest of the public to grant discretionary relief afforded entrymen under the desert land laws by way of extensions of time to make final proof or to purchase the entry, where the entry is situated in California and requires water from the Colorado River for its reclamation.

In a letter of January 7, 1965, addressed to the Assistant Manager of the Riverside District and Land Office, the appellant suggests that it is possible to obtain water from underground sources. However, notwithstanding such possibility, the rulings in the recent cases cited above would be an additional reason why the allowance of the subject application would not be in the public interest and must be rejected.

In view of the above facts, the decision appealed from is affirmed as herein modified.

This decision constitutes a final administrative determination by the Department in this matter. 43 CFR 1844.1.

James F. Doyle
Chief, Office of Appeals
and Hearings

Approved: May 7, 1965

Jn A Carver Jr
Under Secretary of the Interior

DISTRIBUTION:
Mr. Woodrow C. Stingley
Staff Assistant to Assistant Secretary, PLM
Assistant Solicitor, Land Appeals
Docket & Records Section, Solicitor's Office (2)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
RBO

appeal to Sec
Reversed & remanded
A-30507 - 3-31-66

DOCKET FILES

Desert Land Entry: Generally--Cancellation 2226.1-5

A desert land entry is required, by statute, to be canceled, where the statutory life of the entry has expired without the entryman having complied with the applicable law and regulations to perfect it, and constructive service of notice allowing him 90 days within which to showcause why the entry should not be canceled has been had without response thereto. Where such an entry has expired by operation of law prior to the promulgation of the decision in the case of Maggie L. Havens, the entry cannot be suspended under the ruling in that case.

Desert Land Entry: Assignments 2226.1-2

A desert land entry which has expired by operation of law many years ago cannot be assigned, and it is proper to vacate a decision recognizing such an assignment.

Federal Employees: Authority to Bind Government 1810.3(c)

Reliance upon information or opinion of any officer, agent or employee, or records maintained by land offices cannot operate to vest any right not authorized by law.

Inez Mae Moore Pearson, Los Angeles 039326 (May 27, 1965

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUN 9 PM 2 45

In reply refer to:
704
Los Angeles 039326

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

May 27, 1965

BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1965 JUN 9 PM 2 42

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Inez Mae Moore Pearson : Desert Land Entry

Decision Affirmed

Inez Mae Moore Pearson has appealed from a decision of the land office at Riverside, California, dated September 10, 1964, declaring a previous recognition of an assignment of the above-identified desert land entry to her to be null and void.

The decision recites, among other things, that the entry was allowed on March 4, 1915 to Francis M. Moore. By registered letter of October 24, 1919 the Register of the then El Centro Land Office, General Land Office, notified the named entryman that the statutory four-year life of his entry had expired on March 4, 1919, without the requisite final proof and payment having been made. 1/ The entryman was allowed a period of 90 days within which to show cause why the entry should not be canceled for noncompliance with the law. The entryman did not respond within the period provided, therefore, the entry expired on March 4, 1919. The decision also recites that by a decision of the land office of October 22, 1959, an assignment of the subject entry from Carrie B. Moore, successor of the original entryman, to the appellant, Inez Mae Moore Pearson, was recognized. But as the entry had expired on March 4, 1919, there was no entry upon which an assignment could be based; consequently, the land office was without authority to recognize such an assignment. Therefore, the decision of October 22, 1959 was held to be in error, and the assignment was declared to be null and void ab initio.

The appellant contends, in substance, that (1) errors in procedural matters were made by the United States Land Office at El Centro through inadvertence, excusable mistake or neglect, (2) the records submitted with

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1/ Under Reorganization Plan No. 3 of July 15, 1946 (60 Stat. 1100), the functions of the General Land Office and the Grazing Service in the Department of the Interior were consolidated to form the present Bureau of Land Management under the head of a Director. The office of the Commissioner of the General Land Office and the Director of Grazing were at the same time abolished. The land office at El Centro has been discontinued and its functions transferred to the land office formerly at Los Angeles. The Los Angeles land office has been transferred to Riverside, California, and is presently known as the Riverside District and Land Office.

her appeal clearly establish full compliance with the statute and laws relative to desert land entries, (3) the records will clearly establish a final decision by the Commissioner of the General Land Office at Washington, D. C., that the subject entry was legally within the suspension provision of the "Haven's Act", and (4) that irrespective of the disclosed record, equity and justice demand relief be granted her as the assignee of the deceased entryman.

The appellant argues that with regard to the notice of expiration of the entry being sent to the entryman, the records show there is a lack of proof of any kind that the "first notice" was sent; that the only recorded evidence is of the second notice having been mailed on October 24, and returned on November 26 [1919]; and that there is positively no evidence that the entryman ever received the "OSC" form. The appellant also argues that the then Register and Receiver in the El Centro land office were trying to do business in a "two-by-four" office, overworked and under staffed, and the possibility and probability of errors were innumerable; but, through excusable mistakes, inadvertence or neglect, the probabilities were in favor of the entryman that he had made his application for an extension of time [presumably for the purpose of making final proof on the entry]. The appellant asserts that in view of the difficulty in ascertaining the true facts in this case at this late date, it is necessary to take into consideration the various acts shown by the records, such as shown on the "Register of Actions" or "Case Log", which apparently is the record of the General Land Office, from which it is noted that no entry of recommendation for cancellation by the Register or Receiver, and no action by the Commissioner have been entered. The appellant also asserts that the record contains an entry of May 23, 1924 indicating that the subject desert land entry was suspended within the purview of the Haven's case, and correspondence of various dates from the Los Angeles Land Office about the case, reiterated that it was suspended under the "Haven's Act". The appellant also alleges that the letter from the then Commissioner, General Land Office to the El Centro Land Office, dated May 27, 1924, stating that the subject entry, among others, was suspended under the "Haven's Act", was tantamount to a decision by the Commissioner, and the decision appealed from in this case declaring the assignment to be null and void is res judicata.

In addition to the above-cited allegations, the appellant states that she has leased the entry for a period of fifteen years on a monthly rental basis to the Pima Cattle Company, which leases were entered into in reliance upon statements of employees of the land office, based entirely on their search of the records and without any knowledge whatsoever that the government would or might claim a forfeiture of the entry and rejection of the approval of the subject assignment.

The appellant concludes that in face of the record on file in this case and the constant statements of the status of the entry with regard to the "Haven's Act", and the decision of the Commissioner, the suspension order of 1924 is a part of the process of final proof and final entry, and is therefore, legally cognizable during all of these years. The appellant asserts that justice and equity require that the entry be reinstated under the "Haven's Act", or that she be given not less than three years in which to make final proof under procedure for patent.

It must be stated at the outset that the suspension of certain desert land entries located in Imperial County, California, which were withdrawn as a part of the Yuma Irrigation Project on October 19, 1920, pursuant to the Act of June 17, 1902 (43 U.S.C., 1958 ed., sec. 416), was made in accordance with the administrative ruling of the Department in the case of Maggie L. Havens, A-5580 (October 11, 1923), and was not as a result of an act of Congress of the United States, as suggested by the appellant. The Havens case directed that the entry involved in that case and other desert land entries "similarly situated" be suspended until water becomes available. In that case the entry was later covered by a reclamation withdrawal, as is the case here: the entrywoman had done all she could to obtain water; she specifically chose not to elect relief under one of the provisions of the Act of March 4, 1915, and requested that the entry be suspended.

The entry here under consideration is in an entirely different category. The entryman did not request an extension of time within which to make final proof on the entry. Nor is there of record any request for suspension of the entry under the Havens ruling other than that contained in the appellant's appeal.

The record does show that the entryman was mailed a notice, dated October 24, 1919, to his address of record by registered mail, informing him that the statutory life of his entry expired without his having made final proof and payment, and allowed him 90 days within which to show cause why his entry should not be canceled for noncompliance with the requirements of the law. The first notice of the registered mail was sent to him by the El Centro post office on October 24, 1919. Apparently the registered letter was not delivered to him, and the post office sent him a second notice of the registered letter on November 26, 1919. Evidence in the record shows that the entryman did not receive the registered letter, and it was held in the post office for thirty days before being returned to the El Centro land office. Under the rules and regulations of the Department of the Interior in force at that time, the retention of the unclaimed registered letter in the post office for thirty days, and return to the land office constituted constructive service of the notice of the expiration of the entry on the entryman. Cf. McKenzie v. Hall, 46 L.D. 172 (1917). The entryman having failed to comply with the law as to submitting final proof and payment in connection with the entry, the entry expired by operation of the law on March 4, 1919. Cancellation of the entry was therefore required by statute. Cf. Harley G. Ball et al., A-27942 (June 15, 1959).

Certain notations in the record indicate that the subject entry may have been included in the suspension in connection with the Mt. Signal Canal Company as provided in the Commissioner's letter of January 27, 1920. However, it should be noted that the entry expired by operation of law some ten months and twenty-three days prior to the time such suspension went into effect. It should also be noted that the entry expired one year, four months and twenty-three days prior to the time the suspension under the Maggie L. Havens ruling went into effect.

The fact that the General Land Office inadvertently suspended the entry under the Mt. Signal Canal Company suspension, and under the Havens ruling instead of noting its cancellation on the records, cannot serve to extend the life of the entry. Nor does the fact that the appellant, or her predecessors, were notified that the entry was suspended under the Havens ruling serve to revive or reinstate the entry, it having expired by operation of law. In this respect it has been well established that reliance upon information or opinions of any officer, agent or employee, or the record maintained by the land office, cannot operate to vest any right not authorized by law. Cf. Donald S. Tedford, A-29963 (March 24, 1964). See also 43 CFR 1810.3(c). Furthermore, while it is recognized that the appellant may have suffered grievances, and there have been a number of errors made in this case stemming from the original oversight in failing to close the entry on the records of the land office because of the failure of the entryman to comply with the law in perfecting his entry, we see no reason why these errors should be perpetuated rather than corrected. Cf. Adelheid E. Bosworth et al., A-29601 (November 4, 1963), and cases cited therein.

The only formal request of record for reinstatement of the entry, or for an extension of time within which to make final proof in connection therewith, is that made by the appellant in her appeal. We do not agree, however, that equity or justice require that her request be granted. In this connection the record shows that the only improvement made on the land was that done by the original entryman in making his annual proofs, and which consisted only of rough leveling certain portions of the land in the entry. It was through the entryman's own neglect that he let the entry expire without perfecting it in accordance with the applicable law and regulations. In a similar case it was held that an entry which had been canceled for over a long period of time will not be reinstated unless overwhelming considerations of equity demand it. Cf. Heirs of Albert Peter Mracek, Alford Roos, A-27501 (April 13, 1955).

Moreover, even though equity did indicate that the entry should be reinstated and the appellant be granted an extension of time within which to make final proof on the entry, such reinstatement and extension of time would have to be denied for another reason. This is because reclamation and cultivation of the land in the entry in accordance with the applicable law and regulations would in all probability require the use of Colorado River water for irrigation through the facilities of the Imperial Irrigation District. The Department has recently determined in a similar situation that it would not be in the best interest of the public to grant discretionary relief afforded entrymen under the desert land laws by way of extensions of time to make final proof, or to purchase the entry, where the entry is situated in California and requires water from the Colorado River, because it would increase the pressure on the inadequate water supply available for use in California from this source. See Stephen H. Clarkson, A-30438 (March 25, 1965). To the same effect is Hugh S. Ritter, Thomas M. Bunn, A-30415 (February 24, 1965), and Woodrow C. Stingley, Los Angeles 0153844 (April 27, 1965), approved by the Under Secretary of the Interior on May 7, 1965.

Accordingly, for the reasons stated herein, the decision appealed from is affirmed.

Inez Mae Moore Pearson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C., and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving, by presenting positive and substantial evidence wherein the decision appealed from is in error.

James F. Doyle
Chief, Office of Appeals
and Hearings

Enclosures

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE

1965 JUL 9 PM 2 45

DISTRIBUTION:
Mr. R. N. Whitelaw, Attorney for Appellant (Certified Mail)
Mrs. Inez Mae Moore Pearson
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
RBO

DOCKET FILES

Desert Land Entry: Final Proof 2226.1-5

A request for the extension of the period of time allowed by a land office decision requiring the submission of a supplemental statement to support an application for an election to take a greater length of time to file final proof on a desert land entry, as provided for in the Notice of December 2, 1965 issued by the Secretary of the Interior, will be granted where the request appears to be reasonable, and absent any other objection of record.

Constance Long O'Brien, Los Angeles 038830 (March 14, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAR 28 AM 10 00 (3)

In reply refer to:
704
Los Angeles 038830

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

March 14, 1966

DECISION

Constance Long O'Brien

Desert Land Entry

Decision Modified
Case Remanded

Constance Long O'Brien has appealed from a decision of the District and Land Office at Riverside, California, dated February 17, 1966, which held for rejection her application for election to take a greater length of time within which to file final proof in connection with her above-identified desert land entry. The subject application was filed pursuant to the provisions of a Notice of December 2, 1965, issued by the Secretary of the Interior relative to certain desert land entries in California that were suspended under the ruling in the case of Maggie L. Havens, A-5580 (October 11, 1923).

The decision appealed from held the appellant's application for rejection to take a greater length of time to file final proof, as provided for under paragraph 3(b) (Page 8) of the Notice of December 2, 1965, for the reason that it did not contain sufficient factual data bearing on whether or not the entryman was in the process of actually and diligently reclaiming the entry as of December 2, 1965. The decision, however, allowed the appellant a period of 30 days from the receipt thereof within which to submit, or supplement the submission previously made, by a complete statement of facts concerning the nature, extent, and scope of purported reclamation work being or in the process of being made on the date in question.

In her appeal, the appellant states that she is presently in the process of preparing the required supplemental statement to support her application for election to take a greater length of time to file final proof, provided for in the Land Office decision of February 17, 1966, but has found that it will take more time than the 30 day period allowed to prepare the statement. The appellant has requested an extension of time of approximately 90 days within which to comply with the Land Office decision as to filing the supplemental statement.

The appellant's request appears to be reasonable, and there being no other objection of record, the appellant is granted an extension of time to and including June 20, 1966 within which to file the required supplemental statement. This constitutes a period of approximately 90 days from February 18, 1966, the date the appellant received the decision appealed from.

The required supplemental statement must be filed in the office of the Manager, Riverside District and Land Office, 1414 8th Street, Box 732, Riverside, California, on or before June 20, 1966, as specified above.

The decision appealed from is modified accordingly, and the case record is remanded to the Manager of the Riverside District and Land Office for further appropriate action as may be necessary in the circumstances.

James F Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION
Mr. David W. Richmond
Mrs. Constance Long O'Brien
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

DOCKET FILE

Desert Land Entry: Final Proof 2226.1-5

Where on appeal, an applicant for the election to take the greater period of time to make final proof on a desert land entry, pursuant to the Notice of December 2, 1965 issued by the Secretary of the Interior in connection with certain desert land entries suspended under the Maggie L. Havens ruling, submits information to sustain her application, as provided for in the decision appealed from, which information is not supported by certain factual data available to the applicant, the decision appealed from will be vacated and the appliant will be given an opportunity to submit such factual data to the Manager of the District and Land Office. The Manager will then determine on the basis of the tdal information submitted whether or not the appellant is entitled to take the greater period of time to make final proof on the entry.

Celia Y. T. Lee, Los Angeles 039327 (April 21, 1966)

DEPT. OF INTERIOR
BUR. OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 6 PM 2 49

(3)

In reply refer to:
704
Los Angeles 039327

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

April 21, 1966

DECISION

Celia Y. T. Lee : Desert Land Entry
:

Decision Vacated
Case Remanded

Celia Y. T. Lee has appealed from a decision of the District and Land Office at Riverside, California, dated February 17, 1966, which held for rejection her application for election to take a greater time period within which to submit final proof on her above-identified desert land entry. The application was filed pursuant to paragraph 3(b)(page 8) of a Notice of December 2, 1965, issued by the Secretary of the Interior relative to certain desert land entries in California that were suspended under the ruling in the case of Maggie L. Havens A-5580 (October 11, 1923).

The stated reason for holding the appellant's application for rejection was that it did not contain sufficient factual data bearing on whether or not the entryman of the subject entry was in the process of actually and diligently reclaiming the entry as of December 2, 1965. The decision, however, allowed the appellant a period of 30 days from the receipt thereof within which to supplement the submission previously made or submit a complete statement of the facts concerning the nature, extent, and scope of purported reclamation work being done or in the process of being done on the date in question.

In her appeal the appellant asserts, in substance, that the United States Government sanctioned her acquisition of the subject entry by recognizing the assignment of the entry to her; that there never was any notice advising her of a time limit to complete the job of improving the 160 acres; that during the week of January 9, 1966, arrangements were made to level the land together with other improvements; and that she has the cooperation of a neighboring farmer to make water available to her. The appellant claims that in reply to her letter of February 9, 1966, requesting that she be granted the extension of one and one-half years within which to submit final proof, the Riverside Land Office cautioned her not to enter into any commitments until she was advised that the extended time is available; and as a consequence, she refrained from proceeding with the reclamation of the land in her entry.

In addition to the above allegations, the appellant has offered the following information concerning her entry:

1. The entry lies directly between two newly improved farms, and she has succeeded in obtaining permission to utilize the same source of water supply for the land in her entry. The definite cost of leveling, ditching, and planting is estimated to be $300 per acre.

2. She has enough money saved at the present time to put one-eighth of the land under cultivation, which she understands is the amount of the area needed to be put under cultivation in order to obtain a patent to the entry.

3. In discussing the matter with personnel in the Riverside Land Office she was led to believe that since she had completed surveying and engineering the land and because of its favorable location with water available from adjacent properties, she would be eligible for the long extension of one and one-half years to make final proof on the entry; actual work was held back pending official confirmation of this extension; a Bureau employee admitted to Mr. Strowburgh, who represents her, that there is evidence of some leveling having been done in the past, but the Bureau employee evaded her evidence of maps, receipts, etc., of the engineering done by the Neuman Engineering Co., of El Centro, California; and that the Bureau employee stated he had seen some survey flags, but not the steel corner posts on the entry.

4. The Bureau employee indicated that if she were actually working on the improvements, she would have a chance of getting the extension of time; however, she was advised not to venture into any commitments until the extended time was available.

The appellant's statement to the effect that her entry lies directly between two newly improved farms, and that she has succeeded in obtaining permission to utliize the same source of water supply for the land in her entry, indicates that such water is available from an already completed canal, which either traverses her entry, or is located in the near vicinity of the entry. However, the appellant has submitted no factual data to support this statement. Also, although she states Bureau employees have evaded her evidence of the engineering work done on the entry by the Neuman Engineering Company of El Centro, California, as shown by maps, receipt, etc., she has not submitted this evidence with her appeal. Until the factual data concerning these aforementioned items are submitted, it is difficult to properly evalute the information contained in the appellant's appeal in determining whether or not she is entitled to take the greater period of time allowed by the Secretary's Notice of December 2, 1965, to make final proof on her entry.

Accordingly, the decision appealed from is hereby vacated. The appellant is allowed a period of 30 days from receipt hereof within which to submit the factual data as to her right to use water from the same source as used by adjoining farms, and as to the survey or any other improvement work in the process of being completed on the entry as of December 2, 1965, to the Manager, Riverside District and Land Office, 1414 8th St., Box 723, Riverside, California. At the expiration of the 30-day period specified, the Manager will determine, on the basis of the information submitted with the appellant's appeal and the factual data, if any, submitted by her as specified in this decision, whether she is entitled to take the greater period of time to make final proof on her entry.

The case record is remanded to the Manager of the Riverside District and Land Office for further action consistent with this decision.

James F. Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Mrs. Celia Y. T. Lee
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

appeal to Sec.
dismissed A-30660
9-27-66

DOCKET OFFICES

Desert Land Entry: Generally--Equitable Adjudication 2011.1

Equitable adjudication must be denied to a desert land entryman who has neither cultivated nor reclaimed his entry within the time allowed and in the manner required by the applicable law, and where the explanation given for the failure to comply with the requirements of the desert land law is inadequate.

Desert Land Entry: Reinstatement of Canceled Entries 1826.1

An application for the reinstatement of a desert land entry presented 34 years after proper cancellation and without showing of equities in the applicants which would justify reinstatement, must be rejected.

A. E. Wixom and Coria Allender, Heirs of Bertha E. Wixom (Deceased), Los Angeles 039096 (May 6, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 31 AM 10 00

In reply refer to:
704
Los Angeles 039096

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

May 6, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Heirs of Bertha E. Wixom : Desert Land Entry
:

Decision Affirmed

A. E. Wixom and Coria Allender, as the heirs of Bertha E. Wixom, the original entrywoman in the above-identified desert land entry, have appealed from a decision of the Riverside District and Land Office, dated February 14, 1966, rejecting their application to have the entry reinstated.

Record information shows that Bertha E. Wixom made application for the subject entry on April 22, 1912, which was allowed on the same date. The statutory life of the entry was extended on February 13, 1919, to April 22, 1921 pursuant to the Act of March 28, 1908, 35 Stat. 52, and the Act of April 30, 1912, 37 Stat. 106, 43 U.S.C. §§ 333, 334 (1964). The entrywoman on April 22, 1921, made application for an additional extension of time within which to make final proof on the entry. This last application for an extension of time was rejected by the Acting Commissioner of the then General Land Office by letter dated July 6, 1923, for the reason that the subject entry was among those that had been suspended from January 27, 1920 to April 26, 1923, in connection with the adverse action taken by the General Land Office with regard to the Mt. Signal Canal Company, and this suspension together with the period of 1 year, 2 months, and 25 days remaining in the statutory life of the subject entry, as of January 27, 1920, extended the time within which final proof became due to July 21, 1924. However, it was recommended in rejecting this last application for an extension of time, that the entrywoman could, if she so desired, make application for relief under the Act of March 4, 1915, 38 Stat. 1138-1161, as amended, 43 U.S.C. §§ 337, 338, and on July 6, 1923, the entrywoman did file an application for relief under said act.

The application for relief was allowed by letter dated August 31, 1923, and notice of the allowance was served on the entrywoman on September 8, 1923, as evidenced by the registered mail return receipt card contained in the record. The allowance of the application for relief under the 1915 relief act had the effect of extending the statutory life of the subject entry for a period of five years from the date the notice of allowance was served on the entrywoman, or until September 8, 1928, within which time the entrywoman had the privilege of perfecting the entry in the manner required of homestead entrymen. The record also indicates that the entrywoman was notified that within 60 days from the receipt of the notice of the allowance of her application for relief under the 1915 act, she could elect to purchase the land in the entry. 1/ The entrywoman apparently did not elect to purchase the land in the entry under the subject act. The entrywoman failed to perfect the entry as required by the provisions of the relief act, and by notice served on her at her address of record on June 4, 1932, she was notified of the cancellation of her entry. This notice was receipted for by her husband.

The entry was finally closed on the records of the then General Land Office on November 10, 1932, no response having been received from the entrywoman as to the cancellation of her entry.

On appeal, the appellants refer to the allegations made in their application for the reinstatement of the entry, and by reference thereto make them a part of their appeal. The appellants further allege, in substance, that under the principles of equity and justice, as authorized by 43 U.S.C. s 1161 (1964), in view of the excusable neglect on the part of the entrywoman and her heirs, the right to reinstate the entry should be granted; the Maggie L. Havens decision was in full force and effect until the issuance of the Notice of December 2, 1965, by the Secretary of the Interior, "regarding certain desert land entries in Imperial and Riverside counties, California"; and, according to this notice, water was available within the meaning of the Havens decision as late as March 4, 1952. The appellants assert that for the period between June 4, 1923 (which the appellants erroneously state as being the date of the cancellation of the entry) until March 4, 1952, the entrywoman would have been unable to "prove up" her entry, due to the lack of water, and no hardship was imposed upon the Government by reason of the failure of the entrywoman or her heirs to petition for the reinstatement of the entry during this period. The appellants also aver that since the land in question lies within the service area boundaries of the Imperial Irrigation District, patenting of the land would not increase the water problem, and due to its excellent location and the availability of water, the entry could be reclaimed in compliance with the desert land laws within a comparatively short period of time.

The appellants conclude that, as pointed out in their application for reinstatement, the sum of $3.00 having been expended per acre for

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1/ See 43 CFR 2226.2-7(f).

improvements, the entrywoman would certainly have paid the additional $1.25 per acre to purchase the land, had she been aware of the right to do so, and in light of this fact, and the fact that all assesments levied by the irrigation district have been paid in connection with the entry since 1950, the application for reinstatement should be considered in a favorable light.

After carefully reviewing the entire record in this case, including the appeal submitted by the appellants, we can only conclude that the application for reinstatement of the canceled entry cannot be sustained.

We have no reason to question the fact that the entrywoman may have been hospitalized with serious injuries at the time the notice of the cancellation of her entry was served on her at her address of record on June 4, 1932. However we seriously doubt that the entrywoman could have been unaware of the fact that the statutory life of her entry expired on September 8, 1928, which occured almost four years prior to the time of her hospitalization. We also seriously doubt that the entrywoman was unaware that she had the privilege of purchasing the land in her entry, because she was notified at the time of the allowance of her application for relief under the 1915 act, that she could elect to purchase the land under the provisions of the act. This information was furnished her nine years prior to her hospitalization. It is interesting to note also that the entrywoman, after her release from the hospital, did not make any attempt to inquire into the status of her entry. It also seems rather unlikely that her husband, who receipted for the notice of cancellation of the entry, never discussed with her the cancellation of the entry, or that she or her heirs were unaware of the cancellation of the entry until some time in 1965. There is nothing of record to show that the entrywoman, or her heirs, were ever notified that the subject entry was considered to be suspended under the ruling laid down in the case of Maggie L. Havens, A-5580 (October 11, 1923).

With respect to the appellants' claim that the provisions of the Notice of December 2, 1965, issued by the Secretary of the Interior, would apply to the entry in question, because it is now within the boundaries of the Imperial Irrigation District, and water is available, it must be pointed out that the provisions of the Notice of December 2, apply only to those desert land entries in Imperial and Riverside counties in California, suspended under the Havens ruling, which were active and existing as of December 2, 1965. Under the criteria contained in the notice, only those entries upon which final proof had been accomplished during the statutory life thereof remaining after March 4, 1952, or upon which the entrymen were in the process of diligently making final proof as of December 2, 1965, are to be considered for patenting, and then only upon the filing of an acceptable final proof as required by the applicable desert land laws and the regulations thereunder. It is quite obvious, then, that the subject canceled entry was not one of those coming within the purview of the Notice of December 2, 1965.

As to the appellant's request that the subject entry be reinstated under the principles of equity and justice as provided for in 43 U.S.C. § 1161, the Department has held that equitable adjudication must be denied to a desert land entryman who has neither cultivated nor reclaimed his entry within the time allowed and in the manner required by the applicable law, and where the explanation given for the failure to comply with the requirements of the desert land law is inadequate. Cf. Joe Ann Chatham, Arizona 03514 (October 20, 1964). Furthermore, an application for the reinstatement of a desert land entry presented some 34 years after it was properly canceled and without a showing of any equities in the applicants which would justify reinstatement, must be rejected. Cf. Harley G. Ball et al., A-27942 (June 15, 1959). To the same effect is George W. Dahl, A-27415 (December 10, 1956).

In view of the foregoing, the decision rejecting the application for reinstatement of the subject entry is considered correct and is affirmed.

A. E. Wixom and Coria Allender, Heirs of Bertha E. Wixom, are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellants will have the burden of proving, by presenting positive and substantial evidence wherein the decision appealed from is in error.

John B Piccolo
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosure

Dist. on page 5

DISTRIBUTION:
Mr. J. W. Fleming, Attorney for Appellants (Certified Mail)
A. E. Wixom and Coria Allender
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD (1)
Appeals List No. 1
Hon. John V. Tunney, House of Representatives
RBO

DOCKET CLERK FILES

Desert Land Entry: Final Proof 2226.1-5

Where on appeal, an applicant for the election to take the greater period of time to make final proof on a desert land entry, pursuant to the Notice of December 2, 1965 issued by the Secretary of the Interior in connection with certain desert land entries suspended under the Maggie L. Havens ruling, submits information to sustain her application, as provided for in the decision appealed from, which information is not supported by certain factual data available to the applicant, the decision appealed from will be vacated and the applicant will be given an opportunity to submit such factual data to the Manager of the District and Land Office. The Manager will then determine on the basis of the total information submitted whether or not the appellant is entitled to take the greater period of time to make final proof on the entry.

Audrey June Burge, Los Angeles 052852 (May 19, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 MAY 31 AM 10 00

③

In reply refer to:
704
Los Angeles 052852

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

May 19, 1966

DECISION

Audrey June Burge : Desert Land Entry

Decision Vacated
Case Remanded

Audrey June Burge has appealed from a decision of the District and Land Office dated February 16, 1966, which held for rejection her application for election to take a greater time period within which to submit final proof on her above-identified desert land entry. The application was filed pursuant to paragraph 3(b)(page 8) of a Notice of December 2, 1965, issued by the Secretary of the Interior relative to certain desert land entries in California that were suspended under the ruling in the case of Maggie L. Havens, A-5580 (October 11, 1923).

The stated reason for holding the appellant's application for rejection was that it did not contain sufficient factual data bearing on whether or not the entryman of the subject entry was in the process of actually and diligently reclaiming the entry as of December 2, 1965. The decision, however, allowed the appellant a period of 30 days from the receipt thereof within which to supplement the submission previously made or submit a complete statement of facts concerning the nature, extent, and scope of purported reclamation work being done or in the process of being done on the date in question.

In her appeal the appellant asserts, in substance, that she has been advised that a crash program has been imposed on the 225 entrymen in the area in question, which appears to be a confiscatory action, without a reasonable chance of recourse, (2) there never has been any notice advising any of the entrymen involved that there was a time limit in which they were to complete improvements on the entries until they received the Notice of December 2, 1965, (3) during the week of January 9, 1966, she made arrangements to have the land in her entry leveled and to complete other improvements as were necessary to put the land in productive use, and (4) she has made arrangements with a neighboring farmer to make water available to her. The appellant claims that in connection with her request that she be granted the one and one-half years within which to make final proof on her entry, the Riverside Land Office cautioned her not to enter into any commitments until she was advised by that office that the extension was available; and, as a consequence, she refrained from proceeding with the reclamation of the land in her entry.

In addition to the above allegations, the appellant has offered the following information concerning her entry:

1. The entry lies directly between two improved farms which are now under cultivation. Permission to utilize the source of water has been granted. Actual cost of all improvements, including leveling, proper ditches, and planting, has been determined as $300 per acre.

2. She has been advised that to obtain the patent to the land, at least one-eighth of the total acres of the entry must be put under cultivation. If this ruling is still in effect, she is willing to instigate a crash program to get this accomplished immediately, and develop the remainder in orderly fashion. She is willing to post with the Land Office at Riverside a money deposit sufficient to show good faith.

3. She was advised by the Riverside Land Office that because of the favorable location of the land in her entry to adjacent properties with water readily available, she would probably be eligible for the extension of one and one-half years to prove up her entry, but actual work was delayed pending the official confirmation on this extension. Her evidence of maps, receipts for surveys, and engineering done by the Newman Engineering Company of El Centro, California, can be authenticated. The Bureau employee, who made the field trip, told her that he saw some survey flags upon his visit [to the entry], but not the steel corner posts. The corner posts were and are there.

4. A bureau employee indicated that if she had actually been working on the land at the time of his visit, she might have had a chance of getting the extension. But she was clearly advised by the same office, as previously indicated, not to commit herself until the time extension was confirmed.

5. She has promptly paid taxes and assessments as a land owner in the Imperial Water District through the years.

The appellant did not submit with her appeal any evidence to support her allegations as set forth in items 1 and 5 above, nor did she submit any maps, survey receipts, and the engineering data mentioned in item 3. Until such supporting data is submitted, it is difficult to properly determine whether or not the appellant is entitled to take the greater period of time allowed by the Secretary's Notice of December 2, 1965, to make final proof on her entry.

Accordingly, the decision appealed from is hereby vacated. The appellant is allowed 30 days from receipt hereof within which to submit the above mentioned supporting data to the Manager of the Riverside District and Land Office, 1414 8th Street, Box 723, Riverside, California, for consideration and a determination as to whether on the basis of such evidence she is entitled to take the greater period of time to make final proof on her entry.

The case record is remanded to the Manager of the Riverside District and Land Office for further action consistent with this decision.

James F. Doyle
Chief, Office of Appeals
and Hearings

DISTRIBUTION:
Mrs. Audrey June Burge
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

appeal to Sec
affirmed A-30717
6-30-67

DOCKET FILES

Desert Land Entry: Extensions of Time 2226.2

An application for an extension of time to make final proof in connection with a desert land entry must be rejected where the application is not properly corroborated by two witnesses, and the entryman has not submitted any positive or substantial showing that his failure to reclaim and cultivate the land in the entry within the statutory life of the entry as extended, was due to no fault on his part but to some unavoidable delay in the construction of the irrigation works for which he was not responsible and could not have readily foreseen.

Charles T. McCormack, Los Angeles 0104532 (August 5, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 AUG 12 AM 10 00

In reply refer to:
704
Los Angeles 0104532
August 5, 1966

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Charles T. McCormack : Desert Land Entry
:
:

Decision Affirmed

Charles T. McCormack has appealed from a decision of the Riverside District and Land Office, dated June 9, 1966, denying his request for an extension of time within which to make final proof on his above-identified desert land entry, and canceling the entry. The request for extension of time was denied for the reasons that the request was not accompanied by a $10 service fee, and the corroboration of two witnesses as required by the regulations, 43 CFR 2226.2-6 and 2226.2-4(b), and for the additional reason that the entryman has failed to show he was unavoidably delayed in the construction of the irrigation works intended to convey water to the land in the entry.

The appellant has submitted with his notice of appeal the $10 service fee, thereby complying with the regulation, 43 CFR 2226.2-6. He also submitted an unsigned statement containing the typed names of three different persons and their addresses, regarding the theft of irrigation equipment from the entry, which he has advanced as the main reason for his request for an extension. To this unsigned statement, is appended a note to the effect that the signatures of the persons named therein are no longer readily available, but not necessary for the reason that the theft of the irrigation equipment is a matter of public record.

In the statement of reasons presented by the appellant in support of his appeal, he contends, in substance, that (1) the precedent cases cited by the Riverside Office to sustain its denial of his request for an extension of time have little likeness or bearing on his situation, (2) the fact that his irrigation equipment was stolen is a matter of public record in San Bernardino and Kern Counties, and being of public record, no affidavits or witness statements are necessary, (3) the present "Law" is exactly the same as when his entry was granted, but "interpretations" have changed, local regulations and policies have changed, and impractical formulas have been devised, although given more time he can comply with the law as it is now interpreted, (4) a certain party with whom he entered into an agreement to construct an elaborate water system on the entry failed to perform on the agreement, and this party is presently attempting to get the entry himself for the purpose of developing and subdividing the land, and selling the land in small parcels, (5) still another party (Mrs. Muriel Nunnelley), is soliciting the aid of a Congressman for relief legislation which will allot the property to her; but, she is also a promoter and developer with "big ideas" of promoting the subject property, even though she has very little financial interest in the property, and (6) he has gone on record with the Bureau of Land Management with regard to offering Mrs. Nunnelley reimbursement for any monies she has spent on the entry, although in effect she has invested virtually nothing in the entry. The appellant concludes that the entire situation reeks of fraud, deceit, coverup, and payoff, to the extent the Bureau records have been infiltrated with gross misinformation. The appellant also requests that he be given a two year extension of time, and suggests that the Bureau should conduct a complete investigation of the other facts of the situation.

Briefly, the subject entry was allowed to Robert F. Chisholm on October 4, 1954, and was assigned to the appellant, Charles T. McCormack, on January 25, 1956. On October 2, 1956, pursuant to the provisions of the Act of July 30, 1956, 70 Stat. 715, the cultivation and improvement operations were suspended at the request of the entryman. This suspension expired on March 1, 1959, and it was determined that the statutory life of the entry would expire on March 4, 1961. An extension of time of two years under the relief act of March 28, 1908, 35 Stat. 52, was granted the entryman, which extended the life of the entry to March 4, 1963. The entryman was granted another extension under the relief act of April 30, 1912, 37 Stat. 106, which extended the life of the entry for three years to March 4, 1966. On September 29, 1961, an assignment of the entry to Mrs. Muriel E. Nunnelley was approved, but this assignment was finally determined to be null and void by the Department's decision, Muriel E. Nunnelley et al., A-30074 (August 18, 1964) because the entry was not subject to assignment after having been suspended under the act of July 30, 1956, supra.

We are unable to ascertain from the record any facts that would lead us to believe that the entire situation with regard to this case, reeks with fraud, deceit, coverup, or payoff, as charged by the appellant. This, however, does not prevent the appellant from submitting a formal statement, setting forth in detail such charges, to the appropriate officials of the Department for consideration and any investigation that may be necessary in the circumstances.

Aside from this, and regardless of the appellant's assertions as to what other persons might have in mind with regard to the subject entry, the appellant's request for an extension of time to make final proof on the entry must be considered on its own merits.

At the outset it must be pointed out that the appellant's request for the extension of time here under consideration has not been properly corroborated by two witnesses, as required by the applicable regulation, 43 CFR 2226.2-4(b), and it must be rejected. Such corroboration must be over the signatures of the witnesses. A corroborative statement with the names of the witnesses merely typed in does not meet the requirements, nor does the fact that the pertinent facts involved may be of public record eliminate the need for such corroboration by two witnesses, as suggested by the appellant.

Even if the defect as to the corroboration of two witnesses were to be cured, we conclude that the request for extension of time cannot be granted for the reason that the appellant has not submitted any positive or substantial showing that his failure to reclaim and cultivate the land within the statutory life of the entry, as extended, was due to no fault on his part but to some unavoidable delay in the construction of the irrigation works for which he was not responsible and could not have readily foreseen. Cf. Beryl Kleitz, Philip Rex Kleitz, A-29311 (April 22, 1963).

Even if the facts as to the theft of the irrigation equipment from the entry had been properly corroborated, we do not believe that this would be a sufficient reason for granting the extension of time requested, particularly, in view of the appellant's own statement in a letter of March 28, 1966 to the Riverside Office to the effect he could not ascertain when the equipment was stolen, that it appeared that the equipment was taken at intervals over a period of time by various people, and because of the lack of proper protection. Moreover, it is only reasonable to believe that the loss of such equipment through vandalism or theft could readily have been foreseen, and the necessary precautions taken to prevent such a loss.

It is also apparent from the record that the appellant has not fully utilized the extensions of time already granted him within which to complete reclamation and cultivation of the land in the entry, notwithstanding the fact that some of this time fell during the period when the assignment of the entry to Mrs. Nunnelley was under litigation.

Since the appellant does not have the required reclamation and cultivation completed on the entry to file acceptable final proof, to allow him the usual 90-day period to file such a final proof would be a meaningless gesture in the circumstances. We can only conclude that it was proper to cancel the entry. Cf. Wayne E. Bright, A-30475 (February 4, 1966), and cases cited therein.

Accordingly, the decision appealed from is affirmed.

Charles T. McCormack is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief,
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mr. Charles T. McCormack (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
Appeals List No. 1
OPD
RBO

Appeal to Sec.
affirmed A 30725 4-28-67

DOCKET FILES

Desert Land Entry: Generally--Extensions of Time--Purchase 2226

Discretionary grants of extensions of time to make final proof, or to purchase the land in a desert land entry under the desert land laws will not be made, where to do so would result in the agricultural reclamation of desert land in California with water from the Colorado River since it is contrary to the public interest to increase the pressure on the inadequate water supply available for use in California.

LaVerne Ficken Stanton McCoy, Los Angeles 039297 (August 12, 1966)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1966 AUG 22 AM 10 00 (3)

In reply refer to:
704
Los Angeles 039297

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D. C. 20240

August 12, 1966

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

LaVerne Ficken Stanton McCoy : Desert Land Entry
:
Decision Affirmed

LaVerne Ficken Stanton McCoy has appealed from a decision of the Riverside District and Land Office, dated June 7, 1966, denying her application for an extension of time to make final proof on the above-identified desert land entry, and request for relief under the principles of equitable adjudication. The appellant requested the extension of time under the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. § 333 (1964), the Act of April 30, 1912, 37 Stat. 106, 43 U.S.C. § 334 (1964), and relief in accordance with the principles of equity and justice ennunciated in 43 U.S.C. § 1161 (1964).

Record information shows that the subject entry was allowed to Clarence R. Ficken on May 14, 1914, and pursuant to an extension of time to make final proof granted under the Act of March 28, 1908, supra, the statutory life thereof was extended to May 14, 1921. The entry was suspended from January 27, 1920 to April 26, 1923, in connection with the Mt. Signal Canal Company, and thereafter was suspended on October 11, 1923 under the ruling made by the Department in the case of Maggie L. Havens, A-5580 (October 11, 1923). Subsequently, the land in the entry was included within the service area boundary of the Imperial Irrigation District. The original entryman, Clarence R. Ficken, passed away on April 30, 1958, and the entry was conveyed to the appellant pursuant to the provisions of the order for final distribution of the deceased entryman's estate.

On December 2, 1965, the Secretary of the Interior issued a notice to all desert land entrymen whose entries have been suspended under the ruling in the Havens case, which states in connection with those entries that are now within the service area boundaries of the Imperial Irrigation District, in pertinent part that:

> "Water for irrigation of the entries became available not later than March 4, 1952, when the All-American Canal was officially declared complete. The reclamation, therefore, of the entries was required to have been completed within the statutory life therein remaining after March 4, 1952, and final proof showing such reclamation was due within ninety days after receipt of the notice. Also, in those instances where the entrymen were in the process of actually and diligently reclaiming their entries on December 2, 1965 and the statutory life therein remaining after March 4, 1952 is greater than the ninety-day period allowed to submit final proof, the entryman may, upon application therefor, take the longer period of time to submit final proof."

The statutory life of the subject entry remaining on March 4, 1952, has been computed to be ten months and two days. On February 7, 1966, the appellant made application to take the longer period of time to submit final proof as provided in the Secretary's notice of December 2, 1965, but admitted in regard thereto that reclamation activities in connection with the entry were not being conducted on December 2, 1965. The appellant then filed her request for an extension of time to make final proof under the Acts of 1908 and 1912, as noted above, and for relief under the principles of equitable adjudication.

The decision appealed from denied the request for the extension of time to make final proof on the basis of the fact that one extension of time had already been granted in connection with the entry under the 1908 Act, and on the basis of the determination of the Department in the case of Stephen H. Clarkson, 72 I.D. 138 (1965), that it would be contrary to the public interest to grant any of the discretionary relief afforded to entrymen under the desert land laws by way of extensions of time to make final proof or to purchase where the entry is located in California and requires water from the Colorado River for its irrigation in view of the critical shortage of such water for irrigation purposes. The appellant's request for equitable relief was denied on the basis of the fact that neither cultivation nor reclamation had been accomplished on the entry within the time allowed by law, therefore, there was no opportunity for equitable adjudication.

In her appeal, the appellant admits that water was available in the Imperial Valley Irrigation District not later than March 4, 1952, but that it was not accessible to all of the desert land entries located in the large area of Imperial Valley. The appellant claims that she was informed by certain Imperial County officials that plans were in progress to construct another canal that would be closer to the entry and easily accessible, and for this reason she did not proceed with the construction work necessary to put fresh running water on the land. The appellant asserts that since the Department does not now want further proofs made on the remaining desert land entries because of the declared water shortage in Imperial County that it would seem reasonable that she be allowed to purchase the land in the entry under the discretionary authority granted the Secretary of the Interior by the Act of March 4, 1929, 45 Stat. 1548, as amended by the Act of February 14, 1934, 48 Stat. 349, 43 U.S.C. § 339 (1964). To support her request, the appellant has listed a number of expenditures, relative to the entry, including $500 made by the original entryman with his annual proofs, which total the sum of $1,779.11. The appellant states that if she is allowed to purchase the land in the entry under the discretionary authority provided in 43 U.S.C. § 339, supra, she will be willing to forward a check in the sum of $20 to the designated officer as payment for the first 25 cents per acre as required, and at the end of one year will submit the payment of 75 cents per acre as final payment to secure patent to the land.

The appellant's desire to purchase the land in the entry under the provisions of 43 U.S.C. § 339 is appreciated. However, as stated in the decision below, because of the critical shortage of Colorado River water for irrigation purposes, the Department has held that it would be contrary to the public interest to grant any relief afforded to entrymen under the desert land laws by way of extensions of time to make final proof or to purchase the land where the land is located in California and would require water from the Colorado River for its irrigation. This same question was considered in the case of Stephen H. Clarkson, supra, as well as in the case of Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), and it was determined that the disposal of land under the desert land laws in Imperial Valley in California, in any manner, would undoubtedly increase the pressure on the inadequate water supply available for use in California from the Colorado River, and would be contrary to the public interest. Therefore, in view of the determination made by the Department in the cited cases, the appellant's request that she be allowed to purchase the land in her entry must be denied.

Accordingly, the decision appealed from is affirmed, and the entry is hereby canceled.

LaVerne Ficken Stanton McCoy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by submitting positive and substantial evidence wherein the decision appealed from is in error.

John B. Piccolo
Acting Chief,
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Mrs. LaVerne Ficken Stanton McCoy (Certified Mail)
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
RBO

Appealed to Sec
affirmed A-30893.
3-27-68

D L

Desert Land Entry: Cultivation and Reclamation 2226.1-5

> It is proper to reject an application for an extension of the time for submission of final proof and to close the case where a desert land entry affected by the notice of December 2, 1965, (applicable to entries suspended under the Maggie L. Havens case), was neither actually reclaimed nor in the process of being diligently reclaimed on the date of the notice.

Heirs of Cora Wood Duncan, Los Angeles 039160 (September 1, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 SEP 25 AM 10 00

In reply refer to:
704
Los Angeles 039160

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

September 1, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Heirs of Cora Wood Duncan : Desert Land Entry
:
Decision Affirmed

D. J. Duncan, Jr., James C. Duncan and Dorothy Duncan Rasmussen, heirs of Cora Wood Duncan, have appealed from a decision of the Riverside District and Land Office, dated December 13, 1966, which rejected their application for an extension of time in which to submit final proof and closed their case. This decision was based upon the instructions contained in the Secretary's notice of December 2, 1965, and the various provisions of the Desert Land Law. The decision contains a detailed recitation of the information in the case record. These facts will be set out here in barest outline. The case had its origin on February 28, 1913, when Evelyn B. Keck was allowed a desert land entry. Her application for entry states that she expects to secure her irrigation water supply from the "proposed canal of Mt. Signal Water Co." This expectation was not realized during the original four-year life of the entry. The entry was thereafter suspended until April 26, 1923, and after certain other interim actions were taken, including extensions of time, the entry was again suspended under the departmental ruling in Maggie L. Havens, A-5580 (October 11, 1923). The entrywoman assigned her entry to David Duncan, Jr. and this assignment was approved on September 22, 1941. The assignee died in 1954 and the entry then devolved to his widow, Cora Wood Duncan. The heirs of Cora Wood Duncan have submitted no information showing the date of her death. The said decision also contains references to three items of correspondence. The earliest is a letter from the Land Office to Mrs. Duncan's attorney, dated April 14, 1959, advising him:

> "If Mrs. Duncan is able to get water for the. . . Desert land entry and comply with the requirements for final proof. . ., she may file her notice of intention to make final proof."

The second letter was addressed to Mr. David Duncan on May 24, 1962, and it states, in part:

> "You may at any time, by complying with the Desert Land Law, perfect title to the entry."

The third item of correspondence is a letter to the Riverside District Land Office from D. J. Duncan, Jr., dated February 28, 1966, containing the statement:

> ". . . A subsequent application to the /Imperial Irrigation/ District resulted in their being granted a water right effective January 3, 1966, ..."

The decision contains this reply to the foregoing statement:

> ". . . The records of this office do not indicate that the Imperial Irrigation District granted a 'water right effective January 3, 1966' with respect to the lands in the entry nor is there any basis on which such action can be taken by the District. . . ."

The appellant's allegations are essentially as follows:

1. That they have been misled, either deliberately or carelessly by personnel of the Bureau of Land Management, and that the denial of an opportunity to make final proof constitutes a taking of property without due process of law.

2. That no water was available to the subject parcel until the action of the Imperial Irrigation District January 3, 1966, and that any finding that water was available from the All-American canal after March 4, 1952, is unsupported by any evidence, and any legal conclusion based thereon are arbitrary and capricious.

3. That their efforts to obtain water from the Imperial Irrigation District (although most of the entry lies outside the District's boundaries) should be considered as being "in the process of diligent developing" within the provisions of the notice of the Department of the Interior dated December 2, 1965, regarding certain desert land entries in Imperial and Riverside Counties in California.

4. That the land office decision does not show that approval of the application will burden available water resources in the area.

The rule is well established that this Bureau can grant title to public lands only under acts of Congress which provide for the disposition of such lands. Deffeback v. Hawks, 115 U.S. 392, 407 (1885). The Department has held that no entryman may be granted any right in public land that is not authorized by law. Gerald C. Chisum, A-28295 (June 7, 1960). Consistent therewith, the Department pointed out in Stephen H. Clarkson, A-30438 (March 25, 1965), that:

> ". . . There was no express statutory authority for the suspension granted in the Havens case, and, at best, the action was entirely discretionary with the Secretary. . . ."

The situation was further affected by the decision of the United States Supreme Court in Arizona v. California, 373 U.S. 546 (1963), where it was held that California would be entitled to an annual consumptive use of 4,400,000 acre-feet of water from the Colorado River when an annual total of 7,500,00 acre feet are available for consumptive use from the mainstream in the lower Colorado River basin in the States of Arizona, California, and Nevada. The Secretary's notice of December 2, 1965, points this out, and it also states that California is presently using 5,100,000 acre-feet of Colorado River water annually. The notice then states:

> "It is apparent, therefore, that the assumptions of Colorado River flows which underlay the suspension allowed by the Department in Maggie L. Havens, supra, have long since proved to have been unwarranted.
>
> "In these circumstances, it would be contrary to the public interest to increase the pressure on the inadequate water supply available for use in California from the Colorado River by permitting additional federally owned lands to be developed under the desert land laws unless clear eligibility exists or unless clear grounds for relief are shown. . . ."

It is appropriate at this juncture to mention that the assignee knew when he accepted the assignment on September 22, 1941, that the desert land, in the entry which was allowed in 1913, could not be reclaimed because no irrigation water was available in 1913 and 28 years later the same condition prevailed. Therefore, it must be assumed that the assignee was aware that he had entered into a very speculative venture that might never succeed. The assignee's successors in interest were encouraged in 1959 and again in 1962 to perfect their title to the land by securing irrigation water. This they did not do. They cannot at this late date be permitted to impose upon the Government the duty of securing for them a source of irrigation water. See La Verne Ficken Stanton McCoy, A-30725 (April 28, 1967).

The charge of taking property without due process of law is not supported by any evidence. The Department has consistently held that persons who avail themselves of the privilege of submitting their grievances for adjudication are required to assume the burden of pointing out clearly the precise grounds upon which reversal is sought. United States and Salt Lake City v. Wayne E. Watrons, A-27759 (May 15, 1959). Therefore, the charges will not be considered.

There is no merit to the appellant's charge of having been misled. The information in the case record is conclusively to the contrary.

The appellants have submitted no evidence showing that they have been granted a water right effective January 3, 1966. On the contrary, they admit that most of the land in their entry is "outside the District's physical boundaries." Thus, no purpose would be served by any further discussion of that allegation.

It is true that no water was available to the appellants on March 4, 1952. However, in light of the foregoing discussion, this fact cannot be employed by the appellants as a device to give validity to their non-existent rights.

Accordingly, the decision appealed from is affirmed.

The heirs of Cora Wood Duncan are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
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OPD
Appeals List No. 1
MHS

Appealed to Sec

affirmed in Part
Set aside " "
Remanded A-30902-3-21-68

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 OCT 10 PM 2 53

Desert Land Entry: Cultivation and Reclamation 2226.1-5

Equitable adjudication is properly denied the heirs of a desert land entryman whose entry was affected by the notice of December 2, 1965, which is applicable to entries accorded the benefit of suspension under the Maggie L. Havens case, and who had not on the date of the said notice actually reclaimed the entry or who were not then in the process of actually and diligently reclaiming the entry.

Heirs of Arthur Arnold Allen, Los Angeles 039412 October 3, 1967

In reply refer to:
704
Los Angeles 039412

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 3, 1967

CERTIFIED MAIL
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DECISION

Heirs of Arthur Arnold Allen : Desert Land Entry
:
Decision Affirmed as Modified

Elizabeth A. Stump and Mary A. Brown, the sole surviving heirs of Arthur Arnold Allen, deceased, have appealed from a decision of the Riverside District and Land Office, dated January 20, 1967, rejecting their application for equitable relief and closing their case. This District and Land Office decision was prompted by departmental decision Heirs of Arthur A. Allen, A-30372 (January 21, 1966), which had vacated and remanded a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated September 16, 1964. The said decision of the Office of Appeals and Hearings had affirmed a Land Office decision of March 3, 1964, cancelling Mr. Allen's desert land entry on the ground that the life of the entry had expired without completion of the reclamation requirements of the desert land law. The departmental decision instructed this Bureau to consider this case under the Secretary of the Interior's notice of December 2, 1965, concerning the desert land entries suspended under the ruling in Maggie L. Havens, A-5580 (October 11, 1923).

The Secretary's notice of December 2, 1965, states, in pertinent part, as follows:

> (1) Effective on the date of this notice, the blanket suspension allowed by the Department's decision in Maggie L. Havens, supra, is hereby revoked.
>
> (3) (b) If you are in the process of actually and diligently reclaiming your entry but its reclamation has not been completed as of the date of this notice, and if the statutory life that remained in your entry after March 4, 1952, is greater than the 90-day period allowed in /this notice/ you may have such greater period within which to file your final proofs. You must, however, within the 90-day period, notify the Bureau of Land Management, at the address indicated below, in writing of your election to take such greater period. Failure to give such notice within the 90-day period will result in cancellation of the entry.

The decisive part of the District and Land Office decision is stated as follows:

> It is provided in the December 2, 1965 Notice in connection with the suspended entries located within the service area

boundaries of the Coachella Valley County Water District that water for the irrigation of such entries became available by not later than March 4, 1952, when the All-American Canal was officially declared complete. The reclamation, therefore, of such entries was required to have been accomplished within the statutory life therein remaining after March 4, 1952, and final proof showing such reclamation was due within ninety days after receipt of the Notice. In those cases where the proof filed within the ninety-day period shows either that the entry has been developed or was in the process of being diligently developed on the date of the Notice and "substantial expenditures have already been made in physical improvements now in position," such proofs will be considered in accordance with the principles of equity and justice as authorized by the Act of September 20, 1922, supra, notwithstanding that such development was not completed within the statutory life remaining after March 4, 1952. The Notice further provides that in any case where the entryman was in the process of actually and diligently reclaiming his entry on December 2, 1965, and the statutory life therein remaining after March 4, 1952 is greater than the ninety-day period allowed to submit final proof, the entryman may, upon application therefor, take longer period of time to submit final proof.

At a conference in this office on February 24, 1966, Mrs. Elizabeth A. Stump stated that no reclamation work has been accomplished in connection with the entry and that the entry was not in the process of being actually and diligently reclaimed on December 2, 1965. Accordingly, the relief afforded by the Notice, stated above, is not available in this case.

The appellants allege, in pertinent part as follows:

> The basis of our appeal is that the Bureau of Land Management has been in error all these years - both in withholding information and in giving false information. Since 1964 when your file was brought up to date and the information therein coincided with ours, we have had contact with many officials, requesting that the case be considered on its individual merits. We do not feel that it has been so considered. . . .
>
> 1. After a visit to Coachella Valley where we found that the 40 acres named above was completely surrounded by land under cultivation, some bearing citrus, we wrote a letter dated January 10, 1964 in which we asked that our entry be reviewed. . . .
>
> *　　　*　　　*　　　*　　　*
>
> 4. To prove our point that we feel our previous appeals have not been read or understood, we quote the following

> - page 2 of April 18, 1966, appeal . . . "The heirs of the entryman are now in an anomalous position. They were told that all improvements to the entry were prohibited by Havens. That advice was reversed in 1966, but they were told they still could not make improvements since their entry was cancelled as not properly under Havens. That decision was again reversed on January 21, 1966, and they were told they would be treated as though their entry was properly suspended by Havens. Yet on December 2, 1965, before they knew their reclamation requirement was suspended under Havens they were told that their reclamation work had to be either provable within 90 days or diligent work in progress on that date.
>
> * * * * *
>
> In order that justice may be done, we respectfully request that the Secretary of the Interior exercise his discretion pursuant to 43 USCA 1161 and grant an extension of our entry, allowing us reasonable time within which to complete the reclamation requirements of the Desert Land Law.

The appellants' allegations are not supported by the facts in the case record. Since the decisive facts have not been set out in any significant detail in the previous decisions, in the interest of clarity, it will be done here. The record shows that Arthur Arnold Allen, age "31 years," and engaged in the occupation of "Farmer" filed an application for desert land entry on November 4, 1915 for 40 acres of land located in the SE¼SE¼ of Sec. 18, T. 7 S., R. 8 E., SB Mer. This application states, "I expect to obtain my water supply to irrigate said land from Pumping Wells." The application also contains a diagram showing the plan of irrigation and it mentions a "150 ft. pump well ¼ mile north in Sec. 18", a "2000 ft. well flowing 3/4 mile NE Sec. 17" and a "1200 ft. pump Well. . . /in/ sec. 18." A field investigation report of the General Land Office, dated March 30, 1916, states, in part:

> Conditions for obtaining water from underground sources on the land in question are very favorable. . . . An almost inexhaustible supply of water can be obtained within 65 ft. of the surface. There are several wells in the immediate vicinity which are yielding a large quantity of water. . . .
>
> . . . it is entirely feasible to reclaim the land in question with a water supply obtained from wells sunk on the land. . . .

The desert land entry was allowed on April 11, 1916. The entryman's first annual proof shows that he had spent $40 to level and break 3 acres of land. The second annual proof shows that the entryman had again spent $40 in partially leveling 8 acres of the land. The third annual proof shows that

$45 was spent clearing or breaking 4 acres of land. On April 12, 1920, the entryman applied for a 3 year extension of time. The affidavit in support of the application states:

* * * *

> . . . at the time of making said entry he expected to secure a supply of water for said land from what is known as the All American Canal and that the deponent believed at that time that the said canal would be in operation and a water supply secured prior to the 11th day of April 1920.
>
> * * * *
>
> Deponent further states that he did not feel justified in putting down a well and installing a pumping plant at great expense when the water supply would be procured from the said All American Canal.
>
> * * * *

The entryman was notified, on July 22, 1920, that his application for an extension of time was held for rejection, subject to his right to apply for a hearing or to appeal. He was also informed that in support of his claim for extension he could make a further showing that he would be able to develop water from wells to irrigate the land. Mr. Allen, by a letter dated August 5, 1920, applied for a hearing. On January 17, 1921, the Register at the Land Office received a notice from a physician that Mr. Allen would not be present at the hearing on Jan 17th, 1921 for the reason that he had a fractured arm as a result of an auto accident. The hearing was nevertheless held on that date and Mrs. Frances B. Allen appeared and testified regarding the expected source of her husband's water supply, to the effect that although he had perfect faith in the water supply in that region, he had delayed development due to wartime conditions, which created a shortage of drilling rigs and well casing, and which had made well-drilling very expensive. (Tr. 20).

Mrs. Allen testified as follows regarding the then proposed All-American Canal (Tr. 21 and 23)

> Q. In the commissioner's letter, he states that Mr. Allen asks for an extension of time on the grounds that he expects to obtain water from the proposed All-American Canal, and the way I understand you now desire an extension of time for the purpose of obtaining water from a well.
>
> A. At the time this was filed. . . Mr. Allen stated his case to an attorney, but at the time he filed on this land he had every intention of drilling a well, and had no other intention until this agitation about a year ago, and this preliminary survey, which really gave him the idea of thinking that in case this was a definite proposal, that we would be subject to the advantages as well as the

> burden, of carrying this on, and that it would be too bad to sink several thousand dollars for a well, and then have the canal come through, and probably could have the advantage, as well as the support of it, and it was an error in stating it to the attorney at the time he filed to obtain it from that source, but when he did ask for extension in February he simply had in mind that if it was definite we could ask it on that ground, but if that is too indefinite at this time to consider at all, we promise to make every effort to sink the well within a few years time in order to get water . . . .
>
> *   *   *   *   *
>
> Q. Did Mr. Allen ever enter into any negotiations with any officers of this All-American Canal with reference to securing this water supply, or were any proposals or representations made to him by any officers of the All-American Canal Company.
>
> A. No
>
> Q. This proposal then to secure water from the All-American Canal was based on nothing definite.
>
> A. No, nothing definite

The Assistant Commissioner of the General Land Office, by a letter dated August 24, 1921, granted the entryman a 3-year extension of time in which to submit his final proof. The entryman, thereafter, by a letter dated January 15, 1925, requested a second extension of time, this time for two years. This letter states, in part;

> Pioneering is difficult and lack of funds has caused the delay, ...

The entryman's request for an extension of time was granted and April 11, 1926, was set as the date for submitting his final proof. The record shows that nothing had occurred between April 18, 1925, when the second extension of time was granted, and April 1, 1945, when Mr. Allen died. The next chronological event in the case file is a letter to Mrs. Arthur A. Allen from the District Land Office, dated October 27, 1948. This letter states:

> The Desert Land Entry of Arthur A. Allen is not subject to relief under the Act of February 14, 1934. This entry, which according to our records is governed by the provisions of the Havens case, is excused from making final proof until such time as it is definitely established that water for

> irrigation is available at reasonable cost. If you have not done so, it is suggested that you ascertain the possibilities of irrigation from the Imperial Water District, El Centro, California.

Mrs. Allen died on July 10, 1950. The next material item of correspondence in the case file is a copy of a letter to Mrs. Elizabeth A. Stump, from the Bureau of Reclamation, dated September 1, 1959, rejecting her request for Colorado River water for irrigation purposes. The Coachella Valley County Water District, by a letter dated October 15, 1963, states that the subject land is

> . . . outside our improvement District #1 and have not been included in our distribution system, therefore are not entitled to receive Colorado River water according to our contract with the Federal Government.

The facts in the case record establish conclusively that Mr. and Mrs. Allen deferred drilling a well on their entry because of the expense involved and lack of funds. The record is also clear that as late as 1948 when Mrs. Allen was being given the benefit of the Havens case - to which she was not entitled, she knew that she was not precluded from developing or procuring a source of irrigation water for the purpose of reclaiming the land in her entry. In these circumstances, the appellants' charge "that the Bureau of Land Management has been in error all these years - both in withholding information and in giving false information" is without foundation.

In view of the record information set out above, it is not at all surprising that the subject 40-acre tract "was completely surrounded by land under cultivation". Mr. and Mrs. Allen were aware of these possibilities and had they drilled their well, as promised, they too would have been able to reclaim the land in their desert land entry.

Furthermore, the record does not support the charge that "they were told that all improvements to the entry were prohibited by Havens." On the contrary, the Land Office went out of its way to suggest a potential source of irrigation water from the Imperial Water District. Thus, Mrs. Allen could have saved the entry as late as 1948 and the heirs could have done the same at any time prior to Deeember 2, 1965. This they did not do. Consequently, there is no merit to the appellant's charge.

The Department has ruled that equitable adjudication is properly denied to a desert land entryman who has an entry affected by the notice of December 2, 1965, applicable to entries suspended under the Maggie L. Havens case, and who had not on the date of such notice actually reclaimed his entry, or who was not then in the process of actually and diligently reclaiming his entry. La Verne Ficken Stanton McCoy, A-30725 (April 28, 1967).

At this point it is relevant to observe that the Havens decision of 1923 was not mentioned by Mr. Allen or by the Land Office when his second extension of time was granted and when April 11, 1926, was set as the new date for submitting his final proof. Consequently, instead of having been mistreated, as the appellants' have implied, they were actually in receipt of a benefit to which they were not legally entitled.

The Land Office decision states that according to the information in the case file the subject land, ". . . is now within the service area boundaries of the Coachella Valley County Water District." This statement is not correct. On the contrary, it was noted above that the entry is, ". . . outside our improvement District #1. . . ." Therefore, the March 4, 1952 date, when canal water became available for irrigation, is not applicable to this entry.

The appellants' have not denied the statement in the decision appealed from that at a conference in the Land Office on February 24, 1966, Mrs. Elizabeth A. Stump stated:

> . . . no reclamation work has been accomplished in connection with the entry and that the entry was not in the process of being actually and diligently reclaimed on December 2, 1965 . . . .

In these circumstances, the Land Office correctly ruled that the relief afforded by the Secretary's notice of December 2, 1965 is not available to these appellants.

Accordingly the District and Land Office decision is affirmed as herein modified.

Elizabeth A. Stump and Mary A. Brown are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

Dist. on page 8

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OPD
Appeals List No. 1
MHS

16-20

Desert Land Entry: Cultivation and Reclamation 2226.1-5

It is proper to reject an application for an extension of the time for submission of final proof and to close the case where a desert land entry affected by the notice of December 2, 1965, (applicable to entries suspended under the Maggie L. Havens case) was neither actually reclaimed nor in the process of being diligently reclaimed on the date of the notice.

Celia Y. T. Lee, Los Angeles 039327

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 NOV 1 AM 10 00

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

In reply refer to:
704
Los Angeles 039327

October 20, 1967

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DECISION

Celia Y. T. Lee : Desert Land Entry

Decision Affirmed

Celia Y. T. Lee has appealed from a decision of the District and Land Office at Riverside, California, dated April 18, 1967, which rejected her application for a greater time period within which to submit final proof on her above-identified desert land entry. The application was originally filed on December 26, 1966, pursuant to paragraph 3 (b) (page 8) of the Secretary's notice of December 2, 1965, concerning certain desert land entries in California which were suspended under the ruling in the case of Maggie L. Havens, A-5580 (October 11, 1923). This notice lifted the suspension under Havens, supra, and specifically provided in connection with those entries within the service area boundaries of the Imperial Irrigation District, in pertinent part:

> Water for irrigation of the entries became available not later than March 4, 1952, when the All-American Canal was officially declared complete. The reclamation, therefore, of the entries was required to have been completed within the statutory life therein remaining after March 4, 1952, and final proof showing such reclamation was due within ninety days after receipt of the notice. Also, in those instances where the entrymen were in the process of actually and diligently reclaiming their entries on December 2, 1965 and the statutory life therein remaining after March 4, 1952 is greater than the niney-day period allowed to submit final proof, the entryman may, upon application therefor, take the longer period of time to submit final proof.

Record information relating to Mrs. Lee's entry shows that a desert land entry embracing Lots 3 and 4, S½NE¼, N½SE¼ and SE¼SE¼, Section 1, T. 16 S., R. 11 E., S.B.M., California, was allowed to William G. Gregg on February 11, 1915. A three year extension of time to submit final proof was granted to the entryman under the Act of March 28, 1908 (43 U.S.C. 334(1964)). The entry was suspended from January 27, 1920, to April 26, 1923, in connection with the Mt. Signal Canal Company, and thereafter by order of the General Land Office, dated March 1, 1928, suspended under the Departmental ruling in Havens, supra. Subsequently, the land in the entry was included within the service area boundary of the Imperial Irrigation District. Mrs. Celia Y. T. Lee has acquired the possessory right to Lots 3 and 4 and the S½NE¼ of the above-mentioned section through various mesne assignments, the assignment to her being approved on August 1, 1956. The statutory life of the subject entry remaining on March 4, 1952, was one year, six months, and twenty-nine days.

The Land Office first held Mrs. Lee's application for rejection in a decision dated February 17, 1966. When Mrs. Lee appealed to the Director this determination was vacated by a decision, dated May 19, 1966. Mrs. Lee was allowed an additional 30 days from receipt of the decision to furnish evidence to support her claim that she was entitled to an extended period to file proof because she was actively and diligently engaged in reclamation of her entry as of December 2, 1965. The case was remanded to the Land Office for further consideration in light of any evidence submitted. After Land Office personnel met with the entrywoman and her attorney, Mr. Albert C. Lum, on July 6, 1966, and all subsequent evidence was considered, the Land Office rejected the application and closed the case based on the applicant's failure to prove active reclamation of her entry as required by the Secretary's December 2 notice.

The appellant's allegations are essentially as follows:

1. The Land Office failed to consider all of the evidence submitted; specifically, receipts and maps submitted at the July 6 meeting with Land Office personnel which showed expenditures for surveying and engineering, and letters showing that a source of water had been acquired by the appellant.

2. Regardless of the sufficiency of the evidence the appellant has been improperly denied the one year, six months and twenty-nine days of statutory life remaining in the entry. Such a denial discriminates against the appellant, denies her due process of law, and is contrary to American principles of government.

3. Appellants are entitled to equitable adjudication under the provisions of 43 U.S.C. Sec. 1161, 1162 and 1164.

Mrs. Lee has been afforded ample opportunity to substantiate her allegations of actual and diligent reclamation of her entry as of December 2, 1965. She has been asked to provide sound and credible evidence of her reclamation efforts in the form of maps, surveys, photographs, testimony of neighbors, etc.. Although the appellant claims to have exhibited such evidence at the July 6, 1966, meeting with Bureau representatives, there is no such indication in the record. Mrs. Lee has not submitted any documents of this nature with her appeal. In direct conflict with appellant's unsupported statements the record does show that "an examination of the entry failed to disclose evidence of clearing, ditching, or other reclamation work having been recently completed thereon."

In first responding to the Director's decision of May 19, 1966, Mrs. Lee, through her attorney, Mr. Albert C. Lum, submitted several letters, all dated after December 2, 1965, from Mr. E. J. McDermott, an adjoining landowner. 1/ These letters merely contained general discussions of proposed development and estimated costs of development on the entry.

After Mrs. Lee and her representatives met with Land Office personnel, she submitted additional correspondence from another adjoining landowner, Mr. Ed Eldridge of Dixie Ranches, which contained further discussions of proposed development on her entry. This correspondence clearly indicated that development had not yet been agreed upon or undertaken as late as August 15, 1966. 2/

Mrs. Lee has objected to the Land Office's evaluation of her evidence. She has submitted copies of earlier correspondence with Mr. Eldridge with her appeal to support her case. 3/ These additional letters, by themselves or together with other correspondence of record, do not show a firm agreement by the parties as to a definite plan of development or an express grant of a right to use water for irrigation of appellant's entry. The chain of correspondence on which appellant relies can only be accepted as evidence of preliminary negotations on these matters. The appellant has not provided sufficient proof in her appeal to contravert the Land Office's conclusion that as of December 2, 1965, she was not actually and diligently reclaiming the entry or that substantial expenditures had not already been made in physical improvements then in place, as required by the Secretary's notice. Accordingly, appellant's request for an extension of time was properly denied.

The appellant's allegation that the Bureau's action is discriminatory and denies her due process of law is without merit. The Department has held that no entryman may be granted any right in public land that is not authorized by law. Gerald C. Chisum, A-28295 (June 7, 1960). Consistent therewith, the Department pointed out in Stephan H. Clarkson, A-30438 (March 25, 1965), that:

1/ a. Letter dated January 29, 1966, to Mrs. Henry Lee from Mr. E. J. McDermott.
   b. Letter dated March 11, 1966, to Mrs. Henry Lee from Mr. E. J. McDermott.
   c. Two letters dated March 15, 1966, to Mrs. Henry Lee from Mr. E. J. McDermott.

2/ Letter dated August 15, 1966, to Mrs. Henry Lee from Mr. Ed Eldridge of Dixie Ranches, specifically stated: "Now that the equipment is available we again wish to state our proposal . . . . If you feel this proposal is acceptable please contact me at your earliest convenience so that we may schedule the work."

3/ a. Letter dated June 11, 1963, from Mrs. Henry Lee to Mr. Ed Eldridge, indicating first contact between the parties regarding development of appellant's entry.
   b. Letter dated February 19, 1964, from Mr. Ed Eldridge to Mrs. Henry Lee, stating a proposal for her consideration. No indication in file that such proposal was ever considered or accepted by the appellant.

> . . .There was no express statutory authority for the suspension granted in the Havens case, and, at best, the action was entirely discretionary with the Secretary. . . .

The Department in considering similar requests in Havens type suspension cases has held that because of the critical shortage of Colorado River water for irrigation purposes, it would be contrary to the public interest to grant any relief afforded to entrymen under the desert land laws by way of extensions of time to make final proof or to purchase the land where the land is located in California and would require water from the Colorado River for its irrigation. Laverne Ficken Stanton McCoy, A-30725 (April 28, 1967); Stephen H. Clarkson, supra. It has also been determined that the disposal of land under the desert land laws in Imperial Valley in California, in any manner, would undoubtedly increase the pressure on the inadequate water supply available for use in California from the Colorado River, and would be contrary to the public interest. Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965). In view of these determinations, the Department has already ruled that the Secretary has correctly exercised his discretionary authority by establishing the requirements of the notice of December 2, 1965. Further grants of extensions of time would not be in the public interest.

The appellant's request for equitable adjudication under the provisions of 43 U.S.C. Sec. 1161, 1162 and 1164 (1964) was also properly denied because such relief is available under the terms of the Secretary's December 2, 1965, notice only where the entryman on that date had actually reclaimed the entry or was in the process of actually and diligently reclaiming his entry. As previously indicated herein, the appellant had not met either condition as of the date of the notice.

Accordingly, the decision appealed from is affirmed, and the entry is hereby cancelled.

Celia Y. T. Lee is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by submitting positive and substantial evidence wherein the decision appealed from is in error.

Edward W. Stuebing

Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
Mrs. Celia Y. T. Lee (Certified Mail)
Mr. Albert C. Lum, Attorney for Appellant
Div of L&M S&T (4)
Div of L&M PM (2)
Appeals List No. 1
OPD
NKS

Desert Land Entry: Cultivation and Reclamation 2226.1-5

It is proper to reject an application for an extension of the time for submission of final proof and to close the case where a desert land entry affected by the notice of December 2, 1965,(applicable to entries suspended under the Maggie L. Havens case), was neither actually reclaimed nor in the process of being diligently reclaimed on the date of the notice.

Audrey June Burge, Los Angeles 052852 (October 23, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 NOV 1 AM 10 00

In reply refer to:
704
Los Angeles 052852

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

October 23, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Audrey June Burge : Desert Land Entry
:
Decision Affirmed

Audrey June Burge has appealed from a decision of the District and Land Office at Riverside, California, dated April 18, 1967, which rejected her application for a greater time period within which to submit final proof on her above-identified desert land entry. The application was originally filed on January 7, 1966, pursuant to paragraph 3 (b) (page 8) of the Secretary's notice of December 2, 1965, concerning certain desert land entries in California that were suspended under the ruling in the case of Maggie L. Havens, A-5580 (October 11, 1923). This notice lifted the suspension under Havens, supra, and specifically provided in connection with those entries within the service area boundaries of the Imperial Irrigation District, in pertinent part:

> Water for irrigation of the entries became available not later than March 4, 1952, when the All-American Canal was officially declared complete. The reclamation, therefore, of the entries was required to have been completed within the statutory life therein remaining after March 4, 1952, and final proof showing such reclamation was due within ninety days after receipt of the notice. Also, in those instances where the entrymen were in the process of actually and diligently reclaiming their entries on December 2, 1965 and the statutory life therein remaining after March 4, 1952 is greater than the ninety-day period allowed to submit final proof, the entryman may, upon application therefor, take the longer period of time to submit final proof.

Record information relating to Miss Burge's entry shows that a desert land entry embracing Lots 3 and 4, S½NE¼, N½SE¼ and SE¼SE¼, Section 1, T. 16 S., R. 11 E., S.B.M., California, was allowed to William G. Gregg on February 11, 1915, A three year extension of time to submit final proof was granted to the entryman under the Act of March 28, 1908 (43 U.S.C. 334(1964)). The entry was suspended from January 27, 1920 to April 26, 1923, in connection with the Mt. Signal Canal Company, and thereafter by order of the General Land Office, dated March 1, 1928, suspended under the Departmental ruling in Havens, supra. Subsequently, the land in the entry was included within the service area boundary of the Imperial Irrigation District. Miss Audrey June Burge has acquired the possessory right to N½SE¼ and SE¼SE¼ of the above mentioned section through various mesne assignments, the assignments to her being approved on September 12, 1956. The statutory life of the subject entry remaining on March 4, 1952, was one year, six months, and twenty-nine days.

The Land Office first held Miss Burge's application for rejection in a decision, dated February 16, 1966. When Miss Burge appealed to the Director this determination was vacated by a decision, dated May 19, 1966. Miss Burge was allowed an additional 30 days from receipt of the decision to furnish evidence to support her claim that she was entitled to an extended period to file proof because she was actively and diligently engaged in reclamation of her entry as of December 2, 1965. The case was remanded to the Land Office for further consideration in light of any evidence submitted. After Land Office personnel met with the entrywoman and her attorney, Mr. Albert C. Lum, on July 6, 1966, and all subsequent evidence was considered, the Land Office rejected the application and closed the case based on the applicant's failure to prove active reclamation of her entry as required by the Secretary's December 2 notice.

The appellant's allegations are essentially as follows:

> 1. The Land Office failed to consider all of the evidence submitted; specifically, receipts and maps submitted at the July 6 meeting with Land Office personnel which showed expenditures for surveying and engineering, and letters showing that a source of water had been acquired by the appellant.
>
> 2. Regardless of the sufficiency of the evidence the appellant has been improperly denied the one year, six months and twenty-nine days of statutory life remaining in the entry. Such a denial discriminates against the appellant, denies her due process of law, and is contrary to American principles of government.
>
> 3. Appellant is entitled to equitable adjudication under the provisions of 43 U.S.C. Sec. 1161, 1162 and 1164.

Miss Burge has been afforded ample opportunity to substantiate her allegations of actual and diligent reclamation of her entry as of December 2, 1965. She has been asked to provide sound and credible evidence of her reclamation efforts in the form of maps, surveys, photographs, testimony of neighbors, etc.. Although the appellant claims to have exhibited such evidence at the July 6, 1966, meeting with Bureau representatives, there is no such indication in the record. Miss Burge has not submitted any documents of this nature with her appeal. In direct conflict with appellants unsupported statements the record does show that "an exmamination of the entry failed to disclose evidence of clearing, ditching, or other reclamation work having been recently completed thereon."

In first responding to the Director's decision of May 19, 1966, Miss Burge, thru her attorney, Mr. Albert C. Lum, submitted several letters, all dated after December 2, 1965, from Mr. E. J. McDermott, an adjoining landowner, to Mrs. Henry Lee. Mrs. Lee held Desert Land Entry L.A. 039327, covering the remainder of the original Gregg entry, lying immediately north of Miss Burge's entry. These letters merely contained general discussions of proposed development and estimated costs of development on the subject entry.

After Miss Burge and her representatives met with Land Office personnel, she submitted additional correspondence from another adjoining landowner, Mr. Ed Eldridge of Dixie Ranches, which contained further discussions of proposed development on her entry. This correspondence clearly indicated that development had not yet been agreed upon or undertaken as late as August 15, 1966. 2/

Miss Burge has objected to the Land Office's evaluation of her evidence. She has submitted copies of earlier correspondence with Mr. Eldridge with her appeal to support her case. 3/ These additional letters, by themselves or together with other correspondence of record, do not show a firm agreement by the parties as to a definite plan of development or an express grant of a right to use water for irrigation of appellant's entry. The chain of correspondence on which appellant relies can only be accepted as evidence of preliminary negotiations on these matters. The appellant has not provided sufficient proof in her appeal to contravert the Land Office's conclusion that as of December 2, 1965, she was not actually and diligently reclaiming the entry or that substantial expenditures had not already been made in physical improvements then in place, as required by the Secretary's notice. Accordingly, appellant's request for an extension of time was properly denied.

1/ a. Letter dated January 29, 1966 to Mrs. Henry Lee from Mr. E. J. McDermott
   b. Letter dated March 11, 1966 to Mrs. Henry Lee from Mr. E. J. McDermott
   c. Two letters dated March 15, 1966 to Mrs. Henry Lee from Mr. E. J. McDermott

2/ Letter dated August 15, 1966 to Mrs. Henry Lee from Mr. Ed Eldridge of Dixie Ranches, specifically stated: "Now that the equipment is available we again wish to state our proposal. . . . If you feel this proposal is acceptable please contact me at your earliest convenience so that we may schedule the work."

3/ a. Letter dated June 11, 1963 from Mrs. Henry Lee to Mr. Ed Eldridge, indicating first contact between the parties regarding development of appellant's entry.
   b. Letter dated February 19, 1964 from Mr. Ed Eldridge to Mrs. Henry Lee, stating a proposal for her consideration. No indication in file that such proposal was ever considered or accepted by the appellant.

The appellant's allegation that the Bureau's action is discriminatory and denies her due process of law is without merit. The Department has held that no entryman may be granted any right in public land that is not authorized by law. Gerald C. Chisum, A-28295 (June 7, 1960). Consistent therewith, the Department pointed out in Stephen H. Clarkson, A-30438 (March 25, 1965), that:

> . . . There was no express statutory authority for the suspension granted in the Havens case, and, at best, the action was entirely discretionary with the Secretary . . . .

The Department in considering similar requests in Havens type suspension cases has held that because of the critical shortage of Colorado River water for irrigation purposes, it would be contrary to the public interest to grant any relief afforded to entrymen under the desert land laws by way of extensions of time to make final proof or to purchase the land where the land is located in California and would require water from the Colorado River for its irrigation. Laverne Ficken Stanton McCoy, A-30725 (April 28, 1967); Stephen H. Clarkson, supra. It was also determined that the disposal of land under the desert land laws in Imperial Valley in California, in any manner, would undoubtedly increase the pressure on the inadequate water supply available for use in California from the Colorado River, and would be contrary to the public interest. Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965). In view of these determinations, the Department has already ruled that the Secretary has correctly exercised his discretionary authority by establishing the requirements of the notice of December 2, 1965. Further grants of extension of time would not be in the public interest.

The appellant's request for equitable adjudication under the provisions of 43 U.S.C. Sec. 1161, 1162 and 1164 (1964) was also properly denied because such relief is available under the terms of the Secretary's December 2, 1965 notice, only where the entryman on that date had actually reclaimed the entry or was in the process of actually and diligently reclaiming his entry. As previously indicated herein, the appellant had not met either condition as of the date of the notice.

Accordingly, the decision appealed from is affirmed, and the entry is hereby cancelled.

Audrey June Burge is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C.

20240, and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is taken the appellant will have the burden of proving by submitting positive and substantial evidence wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures 2

DISTRIBUTION:
Miss Audrey June Burge
Kwan, Cohen & Lum (Certified Mail)
    Attorneys at Law
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
NKS

Lett 2-9-68 appeal to Sec.
affirmed A-30921 10-4-68

Desert Land Entry: Cultivation and Reclamation 2226.1-5

No relief will be granted to the heirs of a desert land entrywoman whose entry was affected by the Secretary's Notice of December 2, 1965, who had not on the date of said notice actually reclaimed the entry or who were not then in the process of actually and diligently reclaiming the entry.

Desert Land Entry: Generally 2226

An application to purchase land in a desert land entry, under the Act of February 14, 1934, will be rejected where reclamation of such land would require the use of Colorado River water for irrigation.

Desert Land Entry: Extension of Time 2226.2

Discretionary grants of extensions of time under the desert land laws will not be made where to do so would result in the agricultural reclamation of desert land in California with water from the Colorado River.

Heirs of Bella Agnew, Los Angeles 039526 (November 29, 1967)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1967 DEC 14 AM 10 00

In reply refer to:
704
Los Angeles 039526

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

November 29, 1967

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Heirs of Bella Agnew : Desert Land Entry
:

Decision Affirmed as Modified
Application for Extension of Time Rejected
Entry Cancelled

Mildred Van Hook and Mary Brodrick, the sole surviving heirs of Bella Agnew, deceased, have appealed from a decision of the Riverside Land Office, dated July 21, 1967, rejecting their application to purchase the 320 acres in the desert land entry under the Act of February 14, 1934, 48 Stat. 349, 43 U.S.C. 339, (1964). The decision found that:

> . . . the entry. . . was allowed to Bella Agnew on July 15, 1918. . . . Extensions of time to submit final proof were granted to the entrywoman under the Act/s/ March 28, 1908, . . . and. . . April 30, 1912, . . . pursuant to the statutory life of the entry was extended to July 15, 1928. The entry was placed in a suspended status effective October 11, 1923, under the Departmental ruling in / *Maggie L._/ Havens*, /A-5580 (October 11, 1923)/. . . . 1/

The land office decision held that the extension of time to submit final proof which was granted under the Act of April 30, 1912, *supra*, is of no effect and has not operated to extend the statutory life of the entry beyond the one year, nine months, and four days remaining on October 11, 1923, the effective date of the suspension of the entry. By this reckoning it found that the statutory life of the entry was continued until September 6, 1967, by virtue of the fact that the entry lies outside the service areas of the Coachella Valley County Water District and the Imperial Irrigation District, and therefore that the Secretary's notice of December 2, 1965, lifted the suspension on that date but did not operate to terminate the entry. The decision further held that the appellants have failed to show that it is not feasible to obtain adequate water to effect reclamation of the entry or any legal subdivision thereof, which showing is prerequisite to the granting of relief under the Act of February 14, 1934, *supra*. The decision also raised the issue of whether the appellants, as successors in interest to the original entrywoman by inheritance, are qualified for relief

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1/ The record shows that this entry was suspended under the *Havens* ruling on October 10, 1939.

under the Act, although it did not resolve this issue. The decision concluded that the application for the discretionary relief afforded by the Act must be rejected without predjudice to the right of the applicants to develope a water supply during the remainder of the statutory life of the entry, then calculated to expire on September 6, 1967, or to file a proper application for an extension of time to submit final proof, if necessary.

The appellants allege as follows:

> 1. . . . there is no reasonable prospect that we would be able to develop water sufficient to effect reclamation of the irrigable land or any legal subdivision thereof, . . .
>
> 2. . . . It was . . . anticipated . . . that water would be made available from the Colorado River . . . .
>
> 3. Drilling test wells to locate usable water would cost too much to be feasible.

The appellants have also stated in their reasons for appeal that, "The composition of the ground is not condusive to good agricultural purposes," and that, "water alone will not bring desired results." In addition, they have requested:

> 1. . . . that an extension of time be granted until the services from the Coachella Valley County Water District be made available to our entry; and
>
> 2. . . . such additional time from and after September 6, 1967, as may be properly granted them within which to reclaim the land. . . and to make their final proof, . . .

Mrs. Bella Agnew's application for desert land entry, filed on May 7, 1918, states "that. I expect to obtain my water supply to irrigate said land from wells."

A plan of irrigation which was enclosed with the application and signed by Mrs. Agnew states that she was preparing "to irrigate the land with water obtained from the well as indicated above."

A General Land Office Special Agent's report, dated June 12, 1918, states that the applied-for land is within the Indio Artesian Belt and there are several wells with a depth of from about 100 to 700 feet in the locality with an artesian plan of from ½ to 25 miner's inches. 2/ The best well has a depth of 110 feet and has a flow of about 25 miner's inches. The report also states that a few miles northwest of the applied for land are better artesian wells, and it is generally believed that enough water can be developed in the locality of the subject land for irrigation purposes. The report recommended that the entry be allowed, and this was done on July 15, 1918. Mrs. Agnew filed an application for an extension of time on October 14, 1922, in which she alluded to the salt content of the water secured from wells of 150 feet and she stated therein that:

> At this time your applicant is not financially able to drill a well to sufficient depth to reach fresh water, and is therefore forced to ask for more time within which to obtain money enough to put down a deep well.

Mrs. Agnew filed an application for a second 3-year extension of time on June 26, 1928, in which she again stated that water from wells 150 to 200 feet deep is salty and unfit for irrigation, and that:

> . . . it would be necessary to go . . . from 500 to 1000 feet in order to obtain sufficient water that would not be impregnated with salt, ...
>
> That on account of the high wages prevailing since war times for all mechanical work, I have been financially unable to finance a well of such depth. That I understand prices for all such work is dropping as well as the prices of well equipment, and also my financial conditions are improving so that if given an extension of time, I believe I will be fully able to finance well on said land . . . .

This application was approved for a three-year period from July 15, 1928. Mrs. Agnew died on January 2, 1936, and on October 10, 1939, her entry was noted, "Suspended under Maggie L. Havens decision."

The Department's Havens decision, supra, shows that Mrs. Havens' expected source of irrigation water was "from the Colorado River through the Imperial Canal System." Mrs. Havens' entry "and all other entries similarly situated" were suspended as of October 11, 1923. Mrs. Agnew's entry was not dependent upon water from a canal

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2/ One Southern California miner's inch is 9 gallons per minute. One Statutory miners inch is 11.25 gallons per minute.

or from the Colorado River and Mrs. Agnew and the General Land Office knew this. Furthermore, Mrs. Agnew's extension of time expired on July 14, 1931, and no application for a third extension of time was filed by Mrs. Agnew. Thus, under the desert land laws, Mrs. Agnew's entry became subject to cancellation on July 14, 1931, and there was no legal basis for reviving her entry in 1939 and including it under the *Havens'* suspension. Nevertheless, Mrs. Agnew's entry was accorded the benefits of the Havens' suspension pursuant to *Heirs of Arthur A. Allen*, A-30372 (January 31, 1966).

Mrs. Van Hook inquired of the land office on October 14, 1952, as to the status of her mother's entry, and in a reply dated November 17, 1952, she was advised that the entry was indefinitely suspended and, ". . . if water is now available the entry should be completed as soon as possible and final proof submitted. . . ."

In a subsequent letter from the land office to Mrs. Van Hook, dated March 28, 1956, she was advised that, "If water is still unavailable, there is no way you may earn title to the land at this time."

In another letter from the land office to Mary Brodrick, dated July 9, 1963, she was informed that, ". . . It has been our practice, . . . to lift the suspension and allow the entryman to proceed to final proof when he submits evidence that water is available . . . ."

The appellants were notified by the Secretary's Notice of December 2, 1965, that the *Havens'* suspension is revoked and that it is contrary to the public interest to increase the pressure on the inadequate Colorado River water supply to permit additional federally owned lands to be developed under the desert land laws unless clear eligibility exists or unless clear grounds for relief are shown. The Secretary's Notice also provided for relief, "If you are in the process of actually and diligently reclaiming your entry but its reclamation had not been completed as of the date of this notice, . . ." See also *LaVerne Ficken Stanton McCoy*, A-30725 (April 28, 1967).

The appellants admit that they have not developed a supply of irrigation water for the entry and that they lack the funds to develop such a supply from wells. Thus, the problem in this case is and always has been one of insufficient money, not water. As a matter of fact, the record establishes that some of the well-water in the area has been shown to have a lower soluble salt content than the Colorado River water. Furthermore, since the law requires that the land in a desert entry must be reclaimed, and that an adequate irrigation water supply be established before the land is patented, a request for patent on the ground that irrigation water cannot be secured until after the land is patented, can be given no consideration.

The appellants also admit that any reclamation they may attempt of the land in the entry would be from Colorado River water. In a recent decision the Department denied a desert land entryman the right to purchase the land in his entry under the Act of February 14, 1934, where reclamation of the land would require the use of Colorado River water. LaVerne Ficken Staton McCoy, A-30725 (April 28, 1967). In the Clarkson decision, 72 I.D. 138 (1965), it was held that discretionary grants of extensions of time under the desert land laws will not be made where to do so would result in the agricultural reclamation of desert land in California with water from the Colorado River, since it is contrary to the public interest to increase the pressure on the inadequate water supply that is presently available in that river for use in California.

Accordingly, the request to purchase was properly rejected and the decision is affirmed as herein modified. The appellants' application for an extension of time is rejected and the entry is cancelled. 3/

Mildred Van Hook and Mary Brodrick are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240. The filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Newton Frishberg
Chief, Office of Appeals
and Hearings

Enclosures 2

DISTRIBUTION:
Mary Brodrick and Mildred Van Hook (Certified Mail)
Hon. Harold T. Johnson, House of Representatives
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

3/ See Charles T. McCormick, A-30717 (June 30, 1967).

appeal to Sec.

Desert Land Entry: Assignments 2226.1-2

Where the widow of a desert land entryman died intestate, leaving several surviving children, no one of those children can be accepted as the sole surviving claimant of the desert land entry without evidence of his acquisition of the outstanding undivided interests of the other children.

Where a desert land entry was suspended under the *Havens* ruling and on the date of the Secretary's Notice of December 2, 1965, revoking that suspension, the said entry was neither actually reclaimed nor in the process of being diligently reclaimed, the entryman or his successor in interest is not qualified for relief under that Notice.

The benefits of the Soldiers and Sailors Civil Relief Act of October 17, 1940, cannot be accorded a claimant under the desert land laws, where the claim did not materialize until *after* his entrance into the military service.

One who purports to be subrogated to the rights of a purchaser at a tax sale has no greater rights than the subrogor. Therefore, in the absence of a satisfactory showing that the irrigation works have been constructed and water is available for the land, an application for patent by the subrogee is properly rejected.

One who claims an inchoate interest in a desert land entry, leases the land in the entry to one not qualified to make a desert land entry, in this case the United States Navy, is deemed to have assigned the entry in violation of Section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. 324.

C. Arden Gingery, Michiko Shiota Gingery, Los Angeles 038253 (February 27, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 MAR 6 PM 3 14

In reply refer to:
704
Los Angeles 038253

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington D.C. 20240

February 27, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

C. Arden Gingery : Desert Land Entry
Michiko Shiota Gingery :
:
Decision Affirmed

C. Arden Gingery and Michiko Shiota Gingery, his wife, have appealed from a decision of the Riverside District and Land Office, dated June 30, 1967, which rejected their separate applications and closed their desert land case, in part, as to the 99.40 acres of land located within the service area boundary of the Imperial Irrigation District. The decision also set April 6, 1968, as the closing date for the 190.75 acres remaining in the entry, but which are located outside of the service area boundary of the Imperial Irrigation District. The reasons given for these rulings are as follows:

1. Mr. Gingery cannot be recognized as the sole claimant to the entry because his parents, who had died intestate, [1] were survived by 2 other children in addition to the applicant, and there is no evidence that the interests of those heirs were conveyed to the applicant.

2. Mr. Gingery is not entitled to a patent to the land in the entry under the Soldiers and Sailors Civil Relief Act of 1940, due to disabilities [2] incurred in line of duty, because; (1) he had not succeeded to the entry until after his entrance into the military service, and (2) he had failed to give the notice required by statute.

3. Mr. Gingery had voluntarily surrended his legal right to reclaim the land in the entry by executing several leases of

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[1] The entryman Christofer C. Gingery died intestate on December 23, 1930 and his widow died intestate on May 11, 1950.

[2] The record shows that he had entered the military service in 1942 and was discharged in 1962 in the grade of Lieutenant Colonel for the medical reasons.

the land to the Department of the Navy, beginning on June 22, 1944 and ending on June 30, 1967. Therefore, since irrigation water became available on March 4, 1952 for that portion of the entry within the service area boundaries of the Imperial Irrigation District and since 2 years, 4 months and 4 days of the extended life of the entry remained on the date of the lifting of the Havens suspension, 3/ that portion of the entry within the boundaries of the irrigation district expired on December 9, 1954. 4/

4. Under the Secretary's Notice of December 2, 1965, the entrymen whose desert land entries were suspended by the Havens decision were required to proceed with the reclamation of their entries. As to those lands within the service area boundaries of the irrigation district, the suspension under the Havens ruling expired by its own terms not later than March 4, 1952 and 90 days from date of the 1965 notice were given in which to submit final proof, unless the entrymen were in the process of actually and diligently reclaiming their entries. In that event, if the statutory life of the entry was greater than the 90 days allowed, the entrymen were given the greater period. However, since a recent examination of the land failed to disclose that any clearing, ditching or other reclamation work had been accomplished, Gingery is not entitled to take the greater period of time in which to submit final proof.

5. Under the said Secretary's Notice of December 2, 1965, the suspension of those entries which lie outside of the service area boundaries of the irrigation district, the Havens suspension was lifted on that date and reclamation of the entries had to be accomplished within the statutory life remaining therein on October 11, 1923, the date this entry was suspended. Therefore, since 2 years, 4 months, and 4 days of the extended life of that portion of the entry remained, final proof thereon will be due on April 6, 1968.

6. Any rights authorized by the Act of August 11, 1916, 39 Stat. 506, 43 U.S.C. 621-630 (1964), under which the

---

3/ See Maggie L. Havens, A-5580 (October 11, 1923).

4/ The decision assumed arguendo that the then existing lease to the Department of the Navy prevented the reclamation of the land prior to August 5, 1952.

appellant had acquired a quit-claim deed from the Imperial Irrigation District on April 29, 1952, issued pursuant to a sale for non-payment of district taxes and assessments levied against the lands have been extinquished because the life of that entry had expired on December 9, 1954.

7. The application for equitable relief under the Act of September 20, 1922, 42 Stat. 857, 43 U.S.C. 1161-1164 (1964) must be rejected because relief can be granted only in those cases where the "law has been substantially complied with" and an error or informality is satisfactorily explained as arising from ignorance, accident, or mistake over which the entryman had no control. In this case, neither the reclamation nor the cultivation had been accomplished on the entry.

8. The application to purchase the land in the entry under the Act of March 4, 1929, as amended, 48 Stat. 349, 43 U.S.C. 339 (1964), which grants the Secretary the discretion to sell or not to sell such land, will be denied where the land in the entry is located in the State of California and requires water from the Colorado River for its irrigation; citing Stephen H. Clarkson, 72 I.D. 138 (1965).

Mrs. Gingery's application to purchase under the Act of August 11, 1916, supra, was rejected because the Act provides that unpatented lands sold by an irrigation district may be patented to the purchaser upon a "satisfactory showing that the irrigation works have been constructed and that water of the district is available for such lands," and no such showing has been made.

The appellant alleges, in substantial part, as follows:

1. The District and Land Office decision and the Secretary's Notice of December 2, 1965, upon which it is based, is contrary to law, equity, and justice.

2. The Secretary's Notice of December 2, 1965, is unreasonable, arbitrary, and illegal.

3. The Secretary's Notice is contrary to previous decisions, rulings and interpretations of the Havens decision.

4. The Secretary's Notice illegally purports to adjudicate the rights of all Havens case desert land entrymen en mass without notice or opportunity for a hearing.

5. The Secretary's Notice unjustly deprives the appellant of the right to apply for a further extension of time to reclaim the land under the "Act of 2/25/25 (43 U.S.C. 336)."

6. The periods of time provided in the Secretary's Notice did not apply to appellant because he was in the military service; citing 50 U.S.C. 561 and 564.

7. The limited time allowed to reclaim the land should not apply to him, "because the U.S. by seizing the land without my consent and putting anti-agricultural obstructions thereon * * * cannot now be heard to say in law or equity that my rights have been forfeited, and 2. especially in law because a lessee cannot deny the right or title of his lessor."

8. It is error to cancel the entry as of December 9, 1954, when a letter from the Land Office, dated June 13, 1961, states that the entry is still suspended.

9. The cost of bringing water to the entry would be prohibitive, therefore, it is not feasible.

10. The decision and the Secretary's Notice fail to consider the effect of the permissions to the Navy to use the lands for vital military purposes. For instance, the Department of the Interior on June 22, 1944 granted permission to the Navy to "use my lands * * * for a machine gun range."

11. No notice was received that water was available on March 4, 1952. "(except two in very special circumstances)."

12. The new regulation 43 CFR 2234.3-1(d)(1)(2), that no right-of-way may be granted over Government land to conduct Colorado River water to reclaim those entries is not legal because (a) it is in excess of authority and (b) there was no compliance with the Administrative Procedures Act requiring notice, hearing, etc. before such a regulation is adopted.

13. The decision and Notice is a taking of property without just compensation and without due process of law.

14. Reclamation of the land was not possible because the Navy "prevented it by its seizure * * * in 1944 and by its occupancy and use thereafter. This seizure and use of these lands to and including the present

> day has excused me from proving up on the same for the lawmakers of the Government gave me my rights and the administrations of the Government cannot take them away." Also, he was "told that, if I did not give the Government the lease it required the land would have to be condemned. I never wanted to lease the land * * * but requested a lease for the reason that under its rules payment should be or had to be provided under a lease. I, therefore, assented to a lease as a convenient mode of payment and for no other reason."
>
> 15. The decision ignors the fact that the land is not only claimed by tax deed but by inheritance.
>
> 16. He had a "future interest" in the land prior to entering the military service, therefore, he had an interest. This, was "the possibility of inheritance either by will or succession." This was an "incohate interest" (sic).
>
> 17. The desert land law was substantially complied with by the "off-site" work.

The appellant has also requested a hearing.

The appellant Michiko Shiota Gingery alleges that she has applied to purchase that part of the land in excess of 160, "on the basis, not that I am an assignee (as stated in the decision of 6/30/67, which I am not), but on the basis that I am 'subrogated' to the rights of the said purchaser or his assignee (C. Arden Gingery) as provided for in 43 CFR 2253.8(c) * * * . Neither C. Arden Gingery nor anyone else has ever made an assignment to Michiko Shiota. I Michiko Shiota am a subrogee."

The record shows that the desert land entry was allowed to Christopher C. Gingery on June 10, 1907. Extensions of time to submit final proof were granted to the entryman under the Acts of March 28, 1908, April 30, 1912, and March 4, 1915. The entry was suspended from January 27, 1920 to April 26, 1923, in connection with the Mt. Signal Canal Company and it was again suspended effective October 11, 1923, under the departmental Havens decision, supra. Christopher Gingery died intestate on December 23, 1930 and his widow, Mary Belle Gingery, died intestate on May 11, 1950, leaving C. Arden Gingery and two other living children 5/ as her survivors. The decision states that the land in the entry was leased to the Depart-

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5/ A deposition of Christopher C. Gingery, taken on April 21, 1923, shows, in answer to the 6th interrogatory that there were 4 children: "Arden, Leland, Melba, Bernadine; ages 18, 17, 16 and 7."

partment of the Navy from June 22, 1944, until June 30, 1967. However, the earliest copy of the lease, in the case record is from July 1, 1958, until June 30, 1959, with an option to renew from year to year until June 30, 1961. The lessor named on this lease is C. Arden Gingery and the annual rental for the 290 acres is $261.00. The leases for each year July 1, 1961 to June 30, 1965, contains no option clauses and the rental is $1,740 per year. The lease for the year July 1, 1965, to June 30, 1966, does contain an option clause to June 30, 1967, and the annual lease rental is $1,914. The case record does not show who the lessor was from 1944 until May 11, 1950, and from 1950 until 1958.

It is noted that in his 51 page statement of reasons for appeal, the appellant C. Arden Gingery has in no way responded to the Land Office ruling that in the absence of proper proof he cannot be recognized as the sole claimant of the entry. 6/ The appellant was obliged to submit evidence that he is the sole heir of his mother or that the other surviving children have conveyed their undivided interests to him. The resolution of this salient issue is so fundamental, that in the absence of such proof no legal recognition can be given to his asserted claim to the land in the entry. This alone appears to compromise Mr. Gingery's status as a proper appellant in this case.

Another issue of basic concern is whether all legal rights in the land were forfeited when the entry was leased to the Navy. The allowance of an entry does not vest any title in the entryman. The entryman's right remains inchoate during the entire period of development. And, it is only after he has complied with all of the requirements of the law that the entryman becomes entitled to assert a vested right in the land and receive a patent. Erma F. Andersen, Darl Andersen, A-29513 (July 5, 1963); Donald S. Tedford, A-29963 (March 24, 1964). The Department has recently analyzed the legal effect of a lease of lands in desert land entries. See Idaho Desert Land Entries - Indian Hill Group, 72 I.D. 156, 160, 161, 162, 163 (1965). In that case it was noted that the lessee, the operating corporation, had the exclusive possession of all of the lands of the entrymen and the entrymen appear to have transferred all their rights in the land for a term of 20 years. The departmental decision also refers to the habendum clause in the lease which recites that the lessee shall "have and hold" for the term of the lease. This also appears in the leases in this case. Also, the Department points out that the prohibition in the statute is not a prohibition against leasing, but a prohibition against holding. The essential ingredients of a lease are a transfer of possession

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6/ The appellant C. Arden Gingery submitted an affidavit, dated February 23, 1966, which states in part: * * * Because my mother desired that I have and own desert land entry and the property covered thereby, the other two heirs and surviving children aforesaid of my mother, relinquished and quitclaimed to me, in writing * * * any right, title or interest * * * they * * * had * * *.

The appellant has failed or refused to submit these deeds to this Bureau.

from the lessor to the lessee for a term and for a consideration. This consideration is called "rent." The departmental opinion also contains the following:

> Because the entryman may get his land back, the Decision argues that the transfer is not of the "entire estate" and therefore not an assignment. Such an interpretation can only invite evasions of the purpose of the law. If a 20-year lease is not a forbidden assignment, then neither is a 99-year lease. And if they are assignments, a corporation, or other disqualified person, can get the benefits of the law contrary to the express conditions under which Congress makes the grant. The meaning of the word "assignment" is not so rigid as to require so absurd a result.

Therefore, since a prohibited assignments of the entry was made, the entry was subject to cancellation for this reason alone. 7/ There is no merit to the contention that if the land had not been voluntarily leased, it would have been condemned. The mere fact that the Government has the right to condemn does not give an entryman with only an inchoate interest in the land the right to lease that land.

There is no merit to the appellant's contention that he is entitled to claim the benefits of the Soldiers and Sailors Civil Relief Act of 1940, because he had a "future interest" in the land prior to entering the military service. The appellant cites no legal authority to support his contention and no authority for that position is known here. It is a truism, that this Bureau can grant title to public lands only under acts of Congress which provide for the disposition of such lands. *Deffeback* v. *Hawke*, 115 U.S. 392, 407 (1885). Section 1 of 50 U.S.C. App. 564 limits the suspension of the requirements to a

> * * * desert-land entry made or held under the desert-land laws *prior to the entrance of the entryman or his successor in interest into military service* * * * . (emphasis added)

Section 3 of 50 U.S.C. App. 564 provides that:

> In order to obtain the benefits of this section, such *entryman or claimant* shall, within six months after the effective date of this Act /Oct. 17, 1940/ or within six months of his entrance into military, file or cause to be filed in the land office of the district in which his claim is situated a notice that he has entered military service and that he desires to hold the desert claim under this section. (emphasis added).

7/ In the Indian Hills case a contest was ordered only because the final proofs had been offered and accepted.

50 U.S.C. App. 567 provides that:

> Nothing in this article /sections 560-574 of this appendix/ shall be construed to limit or affect the right of a person in military service to take any action during his period of service which may be authorized by law or regulations of the Department of the Interior for the perfection, defense, or further assertion of rights initiated or acquired prior to the date of entering military service * * * . (emphasis added)

See also Arnold H. Echola, A-30831 (November 16, 1967), citing Casper W. Cole, 48 L.D. 56 (1921). Thus, even if the appellant had filed a notice of entrance into the military service within six months thereof, this notice would have been a vain gesture because he was not and could not have been from 1942, when he entered the military service, until 1950 when his mother died, an "entryman" or "successor in interest." Therefore, the waiver of this statutory requirement, even if it were authorized, would avail the appellant nothing, Consequently, since the relevant sections of the Soldiers and Sailors Civil Relief Act apply only to desert land entrymen or their successors in interest who made their entries prior to entrance into the military service, there is no legal basis for predicating a "future interest" claim under the 1940 Act, supra. In addition, it is not known how an heir to an undivided fractional interest in a desert land entry, can sustain such a claim when his brothers and sisters are not known to this Bureau and have made no claim of benefits under the 1940 Act, supra.

Mr. Gingery was notified, by a letter of November 13, 1964, that the Imperial Irrigation District had notified the District and Land Office, by a letter dated April 16, 1964, "that water is available to the lands included in your entry." This November letter also stated:

> * * * In view of the current availability of water, the suspension provided by the Havens decision must be lifted or revoked. Therefore, we propose to issue a notice to you formally lifting the suspension and causing the time remaining in the entry to continue running.

This letter also invited Mr. Gingery to visit the Bureau's office within 30 days to discuss the matter. Thus, more than a year prior to the Secretary's Notice of December 2, 1965, the appellant was officially aware of the requirement to reclaim the land in the entry. It is noted that the All-American Canal was officially declared completed by March 4, 1952, and the appellant "C. Arden Gingery, a single man", secured a quit-claim deed for a portion of the land in the entry from the Imperial Irrigation District on April 29, 1952. The delayed notice from the Land Office does not excuse the appellant's failure to proceed with the reclamation of the land after March 4, 1952. The mere fact that the appellant had the land under lease to the Navy at that time and for several years thereafter cannot be accepted as an excuse. The burden of completing the reclamation of the land rested with the appellant.

The Secretary stated in his notice of December 2, 1965, 8/ that it was anticipated at the time of the Havens decision that the construction of the All-American Canal would bring sufficient Colorado River water into the Imperial and Coachella valleys to provide a water supply for all irrigable lands included therein. However, the notice states the water-supply problem as follows:

> In Arizona v. California, 373 U.S. 546 (1963), it was held that California would be entitled annually to a consumptive use of 4,400,000 acre-feet of water from the Colorado River when an annual total of 7,500,000 acre-feet of the River's water was available for consumptive use from the mainstream in the lower Colorado River basin States of Arizona, California, and Nevada. California is presently using 5,100,000 acre-feet of Colorado River water annually. Its agricultural uses of this water already crowd or exceed the 3,850,000 acre-feet total of the first three, or agricultural, priorities under the seven-party California-Colorado River water agreement.
>
> However, the continued availability of 7,500,000 acre-feet of mainstream water for consumptive use in the lower basin cannot be anticipated. All experts knowledgeable on Colorado River water supply agree that the supply available for consumptive use will decline to below that figure unless the flows naturally available from within the Colorado River basin are augmented.
>
> It is apparent, therefore, that the assumptions of Colorado River flows which underlay the suspension allowed by the Department in Maggie L. Havens, supra, have long since proved to have been unwarranted.
>
> In these circumstances, it would be contrary to the public interest to increase the pressure on the inadequate water supply available for use in California from the Colorado River by permitting additional federally owned lands to be developed under the desert land laws unless clear eligibility exists, or unless clear grounds for relief are shown as hereinafter provided.

Clearly, since a recent examination of the land in the entry failed to disclose any clearing, ditching or other reclamation work as of December 2, 1965 and since the appellant has admitted in a letter dated February 24, 1966, that:

8/ Copies of this notice were served on the appellant on December 3 and 8, 1965.

> * * * the cost of the necessary facilities to convey the water to the land would be prohibitive * * * .

there is no warrant for holding that "clear eligibility exists" or that there are "clear grounds for relief." Consequently, since the land in the entry was not actually reclaimed or in the process of being diligently reclaimed on the date of the Secretary's Notice the decision of the District and Land Office is affirmed as to C. Arden Gingery.

Hearings in cases such as this are not granted as a matter of right. The appellant has alleged no facts which, if proven would entitle him to the relief sought. Therefore, the request for a hearing is denied. Jack A. Walker, A-30492 (April 28, 1966).

The allegation by Michiko Shiota Gingery that she is entitled to purchase the land because she is a subrogee rather than an assignee is not material to show that the District and Land Office decision is erroneous under 43 CFR 2253.8(c). The rights of a subrogee under sub-section (c) are no greater than the rights of the purchaser at the tax sale. Sub-section (a) of the same section of the regulation provides that the purchaser at a tax sale may receive patent to the land only

> * * * upon satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land.

No such showing having been made by Michiko Shiota Gingery, her application was properly rejected.

C. Arden Gingery and Michiko Shiota Gingery are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing

Acting Chief Office of
Appeals and Hearings

Enclosures 2

Dist. on page 11

DISTRIBUTION:
C. Arden Gingery (Certified Mail)
Michiko Shiota Gingery (Certified Mail)
J. E. Samson, Director Real Estate Division, Department of the Navy
Div. of L&M S&T (4)
Div. of L&M PM (2)
OPD
Appeals List No. 1
MHS

appealed to Sec
A-31021

Desert Land Entry: Extensions of Time--Purchase 2226.2-8

Discretionary grants of extension of time to purchase the land in a desert land entry under the desert land laws will not be made, where to do so would result in the agricultural reclamation of desert land in California with water from the Colorado River, since it is contrary to the public interest to increase the pressure on the inadequate water supply available for use in California.

Desert Land Entry: Relief Acts

A desert land entryman is properly denied the right to purchase his entry under the Act of February 14, 1934, where the agricultural reclmation of the land, which is situated in the Imperial Irrigation District service area, would require the use of Colorado River water.

Equitable Adjudication--Desert Land Entry 2011.1

Equitable adjudication is properly denied a desert land entryman who has an entry affected by the notice of December 2, 1965, applicable to entries suspended under the Maggie L. Havens case, and who had not on the date of the notice actually reclaimed his entry or been in the process of actually and diligently reclaiming his entry.

Vivian M. Cormany, Executrix of Estate of Herbert J. Vatcher, Jr. Los Angeles 044970 (May 24, 1968)

In reply refer to:
704
Los Angeles 044970

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

May 24, 1968

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Vivian M. Cormany, Executrix :
of Estate of Herbert J. :
Vatcher, Jr. :
:

Desert Land Entry

Decision Affirmed

On December 7, 1908, desert land entry Los Angeles 044970 was allowed to Herbert J. Vatcher, Jr., for the W½ sec. 27, T. 12 S., R. 9 E., San Bernardino Meridian, California. The land is within the Imperial Irrigation District. At the entryman's request, the statutory life of the entry was extended to December 7, 1916, pursuant to the Acts of March 28, 1908 (35 Stat. 52) and April 30, 1912 (37 Stat. 106).

On June 25, 1917, the entryman was granted relief under Section 5 of the Act of March 4, 1915 (38 Stat. 1161). The entry was suspended from January 28, 1920, to August 14, 1923, in connection with a proposed resurvey of the township. It was again suspended as of October 11, 1923, under the ruling in the case of Maggie L. Havens, A-5580 (October 11, 1923). By decision of October 6, 1928, and at the entryman's request, the order of June 25, 1917, was recalled and vacated and it was ordered that the entry remain suspended under the Havens decision, supra. No further action was taken until December 10, 1964, when the entryman applied for relief under the Act of February 14, 1934 (43 U.S.C. 339). The entryman died on April 1, 1965, and Vivian M. Cormany has been appointed executrix of his estate.

On December 2, 1965, the Secretary of the Interior issued a notice to all desert land entryman whose entries had been suspended under the ruling in the Havens case that the blanket suspension was revoked and that, as to entries within the service area of the Imperial Irrigation District, the suspension allowed by the Havens decision expired by its own terms not later than March 4, 1952, the date on which the All-American Canal was officially completed. The notice gave such entrymen 90 days from delivery of the notice to submit final proof that the entry was reclaimed in compliance with the desert land law in the period of the life of the entry remaining after March 4, 1952. However, if the entryman could show in such proof that on the date of the notice he had actually reclaimed the entry or was in the

process of actually and diligently reclaiming it, the proof would be considered in accordance with the principles of equity and justice as authorized by 43 U.S.C. 1161, notwithstanding the fact that the work was not done within the statutory life of the entry remaining after March 4, 1952.

On March 14, 1968, the Riverside District and Land Office denied the entryman's application for relief under the 1934 Act, supra, and stated that the case would be closed. From this decision, the Executrix has filed an appeal.

The appellant argues that the decision is erroneous because it is not supported by the facts in the record of the case, it is contrary to the ethical standards normally adhered to in the Department's dealings with land entrymen, and that the cases cited in support of the decision do not support it and do not properly apply to the facts in the case. The appellant has not presented any positive or substantial evidence to refute the facts of record which show that the entryman failed to comply with the requirements of the desert land law. No proof has been submitted to show that the entry has been reclaimed, or that the entryman or his duly authorized agents or representatives were in process of actually and diligently reclaiming the land in the entry on the date of the Secretary's notice of December 2, 1965.

The record shows that the entryman did expend the required amount of $3 an acre on the entry, as indicated by the annual proofs he filed up to April 5, 1912. However, he took no action thereafter to obtain water for the irrigation of his entry, or any portion thereof. Despite the Havens suspension, there was nothing to prevent the entryman from developing a well or wells on his land as a source of water, which was his own proposal in his original application. The appellant states that well drilling activities in the vicinity of the entry resulted in unsuccessful or poor wells. The activities referred to occurred more than 50 years ago. The report of January 5, 1965, from the Bureau's Realty Specialist indicates that the wells presently in the area of the entry were drilled within the past ten years, two of them in 1964. All drillings have been successful. In addition, the Geological Survey drilled a test well in 1964 within the same drainage area. This well has shown a specific capacity indicating that a high pumping rate could be achieved if an adequate pumping plant were to be installed. This information plainly shows that there is water available for irrigation of the lands in the Vatcher entry, depending only upon the completion of a well or wells on the entry. The entryman's failure to take any such action and the fact that there was no cultivation or reclamation of any of the lands in the entry clearly shows non-compliance with the desert land law.

A desert land entry is properly canceled when it is clear that the entryman did not effect compliance with the requirements of the desert land law for reclamation and cultivation of the entry during the statutory life of the entry and any extensions that may have been granted. Wayne E. Bright, A-30475 (February 4, 1966), Mathilda L. Battilana, A-30558 (August 2, 1966).

The appellant has also requested consideration of the entry on principles of equity. Equitable adjudication is properly denied a desert land entryman who has an entry affected by the notice of December 2, 1965, applicable to entries suspended under the Maggie L. Havens case, and who had not on the date of the notice actually reclaimed his entry or been in the process of actually and diligently reclaiming his entry. LaVern Ficken Stanton McCoy, A-30725 (April 28, 1967).

Assuming, arguendo, that no water could be obtained from wells on the land in the entry, the only other water source would be from the Colorado River. In Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), the Department ruled that it is proper to classify lands in Imperial Valley, California, as not suitable for disposition under the desert land law where a favorable classification would, contrary to the public interest, increase the pressure on the inadequate water supply available for use in California from the Colorado River. Furthermore, it would be contrary to the public interest to grant any discretionary relief afforded to entrymen under the desert land laws for extensions of time to purchase the lands in the entry where the lands are in California and require water from the Colorado River for their irrigation. Stephen H. Clarkson, 72 I.D. 138 (1965). A desert land entryman is properly denied the right to purchase his entry under the Act of February 14, 1934, where the agricultural reclamation of the land, which is situated in the Imperial Irrigation District service area, would require the use of Colorado River water. LaVerne Ficken Stanton McCoy, supra.

Accordingly, the decision of the Riverside office denying the requested relief is correct and is affirmed.

Vivian M. Cormany is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington, D.C. 20240 and the amount of the filing fee will be $5. In taking an appeal there must be strict compliance with the regulations. If an appeal is

filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION
W. Cloyd Snyder, c/o Snyder, O'Neil & Hancock, Attorneys (Certified Mail)
Div of L&M S&T (4)
Div of L&M PM (2)
OPD
Appeals List No. 1
LSH

Appeal to be Dismissed A-31067 12-23-68

Desert Land Entry: Applications 2226.1-1

> Lands withdrawn under a first form reclamation withdrawal cannot be entered, selected or located in any manner so long as they remain so withdrawn, and all applications for such entries presented after the date of the withdrawal are properly rejected.

William Y. Murphey, et al., Riverside 1340, 1431, 1435 (September 16, 1968)

DEPT. OF INTERIOR
BUREAU OF LAND MANAGEMENT
SACRAMENTO LAND OFFICE
1968 OCT 1 PM 1 27

In reply refer to:
704
Riverside 1340, etc.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington, D. C. 20240

September 16, 1968

Certified Mail
Return Receipt Requested

DECISION

William Y. Murphey, Juanice H. McCain, and Joe D. McCain : Desert Land Applications

Decisions Affirmed as Modified

Desert land applications Riverside 1340, 1431 and 1435 were filed by the above-named applicants in March, June and July 1968, respectively, for lands in secs. 3 and 4, T. 9 S., R. 22 E., San Bernardino meridian, California. The applications were rejected by separate decisions of July 26, 1968, because the lands applied for were withdrawn in 1929 in the first form pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. 416 (1964) and the instructions in 48 L.D. 153, and the withdrawal has not been revoked, cancelled or rescinded.

Since the issue is identical in all three applications, they will be consolidated in this decision. In their appeals, the appellants claim that the withdrawals are invalid and without present force and effect; that the legality and validity of the withdrawals is dependent upon the proposed use of the lands for irrigation works; that the clear mandate of the statute has been flaunted, and that the land is subject to entry.

The 1902 Act, *supra*, authorized the Secretary of the Interior to withdraw from entry lands required for any contemplated irrigation works. The cited regulations provide that after the lands have been withdrawn under the first form they cannot be entered, selected or located *in any manner* so long as they remain so withdrawn, and all applications for entries after the date of the withdrawal should be rejected.

The courts have emphasized the exclusiveness of such first form withdrawals. In *United States* v. *Hanson*, 167 F. 88 (9th Cir. 1909), the court stated that two classes of withdrawal are provided for by this section [Section 3 of the 1902 Act], and the exception of homestead entry from the second does not apply to the first; withdrawals and reservations thereunder being necessarily absolute. The case of *Donley* v. *West*, 260 U.S. 697 (1922), ruled that "The withdrawal of land for irrigation purposes under this section is a matter that was committed to the Land Department exclusively, and, in the absence

of fraud on the part of the officials of that Department, could not be reviewed by the courts." The *Donley* case stated further that until its restoration to entry, land withdrawn under the first form of withdrawal is not subject to entry, and no right thereto can be initiated by any settler thereon; by its withdrawal the land is segregated from the public domain, and is excepted from the operation of the public land laws; and no right of a private settler attaches to, or hangs over, the land so withdrawn, to interfere with such action as the government may thereafter see fit to take in respect to it. See also *Donley* v. *Van Horn*, 193 P. 514 (1920).

Furthermore, the occupancy by private individuals of public lands during the time they are withdrawn from entry under the 1902 Act constitutes trespass, and the occupant's improvements are made at his own risk. *Capron* v. *Van Horn*, 258 P. 77 (1927). The Department has also ruled that a reclamation withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years have elapsed before the first of certain claims was attempted to be located on the withdrawn lands. *Grace Kinsela*, 74 I.D. 386 (1967).

The rejection of the three desert land applications was therefore proper and the decisions of the Riverside office are affirmed as herein modified.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 1840. See enclosed Form WO 1844-1 and Circular 2137. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington, D. C. 20240. The filing fee will be computed on the basis of $5 for each application included in the appeal. If the appeal covers all applications adversely affected by this decision the total filing fee is $15. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Edward W. Stuebing
Chief, Branch of Land Appeals
Office of Appeals and Hearings

Enclosures

DISTRIBUTION

Brown, Vlassis & Bain, Attorneys (Certified Mail)
William Y. Murphey
Juanice H. McCain
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Div. of L&M S&T (4)
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OPD
Appeals List No. 1